FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
MONOPOLIES AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 2326

FOREIGN TRADE ANTITRUST
IMPROVEMENTS ACT

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FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

THURSDAY, MARCH 26, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. (chairman) presiding.

Present: Representatives Rodino, Seiberling, Hughes, McClory, Railsback, Butler, and Moorhead.

Staff present: Alan Parker, general counsel; Warren S. Grimes, counsel; George E. Garvey, assistant counsel; and Franklin G. Polk and Charles E. Kern II, associate counsel.

Mr. RODINO. The committee will be in order.

This morning we are opening hearings on a legislative proposal to alter our antitrust laws to help U.S. companies compete more vigorously for foreign markets.

There is discontent with and uncertainty about the international reach of present antitrust law on the part of many potential American exporters. They contend that restrictions on joint ventures and other concerted activities unduly hobble them. In addition, many of our closest allies and trading partners resent the extraterritorial reach of our antitrust laws. Some have even enacted laws to block our enforcement efforts.

This suggests that we should consider proposals that would provide greater certainty regarding the international scope of these laws.

H.R. 2326, the Foreign Trade Antitrust Improvements Act, was introduced by Mr. McClory and me to meet this need. It now has 32 cosponsors, including 6 members of this subcommittee. Yesterday, Mr. Thurmond, the chairman of the Senate Judiciary Committee, joined by Senator DeConcini, introduced a companion bill in the Senate.

H.R. 2326 would amend the Sherman Act and the Clayton Act to remove, in a direct and uncomplicated way, any unnecessary barriers to export trading by U.S. firms. At the same time, it would continue to provide antitrust protection for American consumers and competitors.

The proposed amendment to the Sherman Act would establish clearly that export activities—involving both goods and services—are not covered by the act unless those activities have a direct and substantial effect on domestic commerce or U.S. competitors. It would also make clear that foreigners may not sue American firms under our antitrust laws if their activities have no impact on the domestic American market or American competitors.

The Supreme Court has held that section 7 of the Clayton Act applies to joint ventures when the participants form a separate corporation and purchase the new venture's stock. Section 7 prohibits acquisitions that may substantially lessen competition and attacks anticompetitive market concentration in its incipiency. Businesses, therefore, must be cautious when forming such ventures. This bill would exempt from the stringent "incipiency" standard of the Clayton Act joint ventures that are limited to export trading.

These changes would, in my view, allow American firms, particularly small and medium-sized ones, to join together when necessary to enter foreign markets and ease their fear that they may be running the risk of antitrust liability. They would also preserve our strong commitment to competition within our borders and among our producers.

Some foreign animosity toward U.S. antitrust enforcement might also be eliminated, because the domestic-effects standard being proposed would limit the reach of our antitrust laws in a manner consistent with our major trading partners.

The competition for global markets is fierce, and no one should expect modification of the antitrust laws to expand our export trade dramatically. Only increased productivity and efficiency and a renewed willingness to take risks—a characteristic that has been the underpinning of our system of private enterprise capitalism—will insure American producers a major role as competitors in the international marketplace.

We must, however, eliminate obstacles to aggressive and innovative competition by our enterprises in world markets. This is what this legislation intends to do and will do.

There are other proposals that seek the same goal. One, H.R. 2459, would establish a commission to examine the effect of antitrust enforcement on exports. Another, H.R. 1648, would create a complex certification procedure for export associations and companies in the Department of Commerce. Certification would immunize them from antitrust attack and could be revoked only in cases of abuse. To be effective, however, this approach would require extensive regulations and an expanded bureaucracy.

[A copy of H.R. 2326 follows:]

97TH CONGRESS
1ST SESSION

H. R. 2326

To amend the Sherman Act and the Clayton Act to exclude from the application of such Acts certain conduct involving exports.

IN THE HOUSE OF REPRESENTATIVES

MARCH 4, 1981

Mr. RODINO (for himself and Mr. MCCLORY) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Sherman Act and the Clayton Act to exclude from the application of such Acts certain conduct involving exports.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Trade Antitrust Improvements Act of 1981".

SEC. 2. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

"SEC. 7. This Act shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the United States or has the effect of excluding a domestic person from trade or commerce with such foreign nation.".

SEC. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end thereof the following:

"This section shall not apply to joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation.".

Mr. RODINO. This morning our first witness is Malcolm Baldrige, the Secretary of the Department of Commerce, the Department that would be charged with certifying associations under H.R. 1648.

And before he proceeds with his testimony, I invite Mr. McClory to speak.

Mr. McCLORY. Thank you very much, Mr. Chairman.

First of all, I want to compliment you, Mr. Chairman, on the speed with which you have arranged for early hearings on the legislation pending before us, and I am very proud to be a cosponsor with you of H.R. 2326.

The subject of U.S. foreign trade and the competition we are experiencing from our foreign companies is certainly prominent in today's news and a priority of this administration. I noticed in yesterday's Chicago Tribune that the entire business section is devoted to the subject of our foreign trade problems, some of which we are trying to remedy through the legislation which you and I have sponsored. This is also addressed of course, in the export trading company legislation sponsored by Senators Heinz and Danforth.

I would suggest that both within and outside of the Government the awareness of the importance of our export trade efforts has never been greater than it is today. It is not surprising that there has been a corresponding increase in our sensitivity to perceive disincentives to that trade, and a number of recent studies have sought to identify them. The number and extent of these barriers, which we have erected ourselves, was a surprise to me when I first began to examine this issue closely. From the nuclear products export controls to the Foreign Corrupt Practices Act, and from cargo preference requirements to taxation of foreign-earned income, they all affect the opportunities available to the American exporter and potential exporter.

But the question for us today is somewhat narrower. Are our antitrust laws also a disincentive? They are a handy target, because to most of the public and many businessmen they are as amorphous and unknowable as the mysteries of outer space.

To those of us on this committee, however, which has jurisdiction over the antitrust laws, they are real and vital and of constant concern to us. We understandingly hesitate before amending them. That is why I introduced my bill to establish an International Antitrust Study Commission to obtain the comprehensive analysis and expert policy guidance which we may require.

We have had useful advice and useful product from prior commissions with regard to the subject of our antitrust laws, the most recent of them under the leadership of the former head of the Antitrust Division, John Shenefield.

I am pleased to note that the Commission approach is endorsed by several of the witnesses before us today, but if the consensus of this committee is that something needs to be done now—and I believe it does—then the bill on which the two of us share paternity as cosponsors, Mr. Chairman, the Foreign Trade Antitrust Improvements Act, would appear infinitely simpler, clearer, and more effective than any of the alternatives I have seen so far.

I notice that this approach has also won the endorsement of several of today's witnesses. This is not to say, of course, that I have closed my mind with regard to the possible merit of the Export Trading Company Act, H.R. 1648, which I referred to before.

I expect that the administration, including our distinguished Secretary of Commerce, is going to present convincing arguments in support of that legislation and will also comment in an illuminating way with regard to the measure that you and I have sponsored.

So I look forward to Secretary Baldrige's testimony and to the other testimony that we are going to receive today and in future hearings, with the expectation that we can report one or more bills expeditiously out of this committee for the consideration of the House and for enactment by the Congress.

Thank you, Mr. Chairman.

Mr. RODINO. Thanks very much.

Mr. Secretary, you may proceed.

TESTIMONY OF HON. MALCOLM BALDRIGE, SECRETARY, DEPARTMENT OF COMMERCE

Secretary BALDRIGE. Thank you, Mr. Chairman. As a member of the expanded bureaucracy, I am glad to be here.

We have given as an administration strong support to export trading company legislation introduced in the Senate. H.R. 1648, currently before this committee, is identical to the Senate bill, S. 144, and virtually identical to S. 734, which the Senate Banking Committee reported out on March 12. I urge speedy consideration and enactment of this legislation.

U.S. competitiveness has been declining for over two decades. The U.S. share of world manufactures trade, for example, was 25.3 percent in 1960, but only 17.9 percent in 1979. This declining competitiveness was exceeded only by oil prices as a cause of the $112 billion trade deficit we have accumulated since 1976.

In the last 2 years, however, our trade position has improved somewhat, though the deficit is still large. Our $24 billion trade deficit in 1980 reflected an improvement of about $3.5 billion from 1979, despite a $19 billion increase in oil imports. U.S. merchandise exports grew about 21 percent in 1980—marking the second straight year of export growth in excess of 20 percent.

This good news has led an increasing number of observers to conclude that a solution to our trade problems is in sight. I simply can't share this view. Last year's improvement, in fact, stemmed from short-term causes—not from any fundamental improvement in our competitive abilities. The improvement is basically the result of slow economic growth in the United States, which reduces demand for imports, and from the lagged effects of the 12 percent depreciation of the dollar in 1977-78. The effects of these factors will soon change and will result in a weaker trade position for the United States.

In fact, our trade balance deteriorated in the final quarter of 1980 and in January of 1981.

These recent developments seem to foreshadow some of the fundamental factors which are not encouraging for our long-term trade position. World competition in trade will get tougher, not easier. As the share of the world economic pie is going to grow at a lesser rate in the future than it did in the last decade, we are going to see increasing export competition from all of our trading competitors—from less developed countries to industrialized countries.

The President's economic program announced last month recognized the important link between our economic health and the international competitiveness of our goods and services. Enactment of this program is essential to restore the vitality of American industry and to reestablish our ability to compete with foreign producers, not only in world markets but also our domestic market.

However, important as it is to deal with the fundamental factors affecting U.S. competitiveness, we must not overlook those disincentives confronted by U.S. firms attempting to export for the first time or increase their exports. Export trading company legislation which provides a way for businessmen to insure that they will not run afoul of the banking and antitrust laws in their joint export activities will overcome Government regulation that unnecessarily retards export growth.

Mr. Chairman, exporting is complicated and success requires special effort and expertise. Our competitors abroad have had to learn how to export—small and medium-sized firms as well as large firms—in order to survive. Too large a share of U.S. exports come from large firms. We need a mechanism to stimulate and train these smaller firms in this skill such as their foreign competitors are doing.

With a few notable exceptions, the United States does not have large export trading entities. There are some 700 to 800 export management companies in the United States—many of them well-managed and successful businesses—and several thousand small export merchants. Not all of these export companies are adequately financed or managed, and many cannot provide a full range of export services, market intelligence, and knowledge of local business practice.

We need export trading companies that provide a full range of export services to firms of any size interested in exporting. These exporting companies must be sufficiently capitalized to allow operations on a scale that would achieve substantial economies in selling and distributing. These companies must be large and experienced enough to develop new markets for U.S. goods.

In short, we have got to become professionals in this area and stop playing an amateur game.

Mr. Chairman, as mentioned at the outset, the administration supports both the banking and, in general, the antitrust provisions of H.R. 1648. The Attorney General, Secretary of the Treasury, and the U.S. Trade Representative endorse the concept of export trading companies embodied in this bill. However, I will focus my formal comments before this committee on the antitrust aspects of the legislation.

The bills before us today—H.R. 1648, H.R. 2326, H.R. 1799, H.R. 2123, and H.R. 1321—offer several different approaches to the important issue of the kind of assurance export trading companies need that their export-related activities are permissible under U.S. antitrust laws. Our view is that the success of export trading company legislation will depend on giving exporters substantially greater assurance than they now have.

Thus, we favor adoption of title II of H.R. 1648, with minor modifications. Although H.R. 2326 may provide more antitrust certainty than is presently available, those forming an export trading company will want the maximum degree of confidence in the antitrust exemption. For these companies, the certification of title II offers a far more satisfactory solution—a certificate which lists those activities deemed within the scope of the antitrust exemption and offers maximum protection from treble-damage suits.

Furthermore, certification assists antitrust enforcement. All the information necessary to support an exemption has to be supplied and evaluated and is available from enforcement agencies. We urge the committee to adopt a certification procedure along the lines of title II of H.R. 1648.

In our view, the antitrust certification by the Department of Commerce, in effect a kind of antitrust preclearance, is an acceptable compromise of competing interests—the one, to encourage U.S. companies to form ETC's and increase exports; and the other, to insure that antitrust enforcement can protect the domestic economy from potential anticompetitive spillover. The guiding purpose of H.R. 1648 and S. 144 is export promotion. No certification can be issued unless a proposed ETC would serve to preserve or promote U.S. export trade.

With regard to the procedure for issuing certificates to export trading companies and Webb-Pomerene associations, the bill recognizes that basic responsibility for antitrust enforcement and expertise in antitrust law both lie in the antitrust enforcement agencies. Consequently, it gives the Justice Department and the Federal Trade Commission an essential advisory role in the certification procedure. We believe it is important that the fundamental authority to enforce the antitrust laws remain as it is today.

Since we expect to consult fully with the enforcement agencies, I assure you the Commerce Department will administer the certification procedure of title II in accordance with competitive principles.

Finally, we are convinced that the substantive antitrust standards covered by H.R. 1648's antitrust exemption are limited to codification of existing law. By clarifying what kind of joint export activity is permitted under U.S. antitrust law, we will be reducing the uncertainty which U.S. firms face in competing abroad.

In summary, Mr. Chairman, we believe export trading companies can play an important role in expanding U.S. exports. We urge the committee to adopt the provisions of title II of H.R. 1648.

I must note before closing that the administration opposes sections 106 and 107 of the bill, the two provisions on financing. As we all strive to reduce Government spending substantially, we cannot support new appropriations or authorizations for expenditure programs. Furthermore, we believe we could administer title II of this bill within our International Trade Administration without major additional resources. Therefore, we feel it is unnecessary to require legislatively the establishment of a special Office of Export Trade to carry out the certification and promotion functions.

Thank you very much.

[Statement of Malcolm Baldrige follows:]

STATEMENT OF MALCOLM BALDRIGE, SECRETARY OF COMMERCE

Mr. Chairman, I am pleased to appear before you today as Administration spokesman testifying in favor of export trading company legislation. This Administration believes that such encouragement to joint exporting is necessary to our national export effort. We have given strong support to export trading company legislation introduced in the Senate. H.R. 1648, currently before this Committee, is identical to the Senate bill, S. 144, and virtually identical to S. 734, which the Senate Banking Committee reported out on March 12. I urge speedy consideration and enactment of this legislation.

THE U.S. COMPETITIVE POSITION

Before turning to the question of how export trading companies will help in expanding U.S. exports, I'd like to clarify some confusion regarding our international competitive position. U.S. competitiveness has been declining for over two decades. The U.S. share of world manufactures trade, for example, was 25.3 percent in 1960, but only 17.9 percent in 1979. This declining competitiveness was exceeded only by oil prices as a cause of the $112 billion trade deficit we have accumulated since 1976.

In the last 2 years, however, our trade position has improved somewhat, though the deficit is still large. Our $24 billion trade deficit in 1980 reflected an improvement of about $3½ billion from 1979, despite a $19 billion increase in oil imports. U.S. merchandise exports grew about 21 percent in 1980—marking the second straight year of export growth in excess of 20 percent.

This good news has led an increasing number of observers to say we have turned the corner in our trade position—and that we no longer have to worry about our exports and our international competitiveness.

Unfortunately, I cannot share this view. The fact of the matter is that last year's trade improvement stemmed from short-term causes—not from any fundamental improvement in our competitive abilities. The improvement is basically the result of slow economic growth in the United States (which reduces demand for imports) and from the lagged effects of the 12 percent depreciation of the dollar in 1977-78. The effects of these factors will soon change, and will result in a weaker trade position.

In fact, trade data for the last few months indicate that this change may already have begun. Our trade balance, which had improved in each of the first three quarters of 1980, deteriorated in the final quarter. The negative January balance of $4.4 billion equalled the increased fourth quarter deficit as imports shot up strongly again over the high December value and exports declined.

These recent developments seem to foreshadow some of the fundamental factors which are not encouraging for our long-term trade position. World competition will get tougher, not easier. To me, the most important point is that by most estimates world economic growth will be slower for the next decade than it was in the last 20 years.

This means that all nations will be increasing their efforts to seek export growth, while at the same time they will be more reluctant to liberalize further access to their own markets. In addition, we will be facing new competition from the less developed countries in low and moderate technology products—while, at the same time, we will find the industrial nations pressing us strongly in high technology products.

The President's economic program, announced last month, recognizes the important link between our future economic health and the international competitiveness of our goods and services. Enactment of this program is essential to restore the vitality of American industry and to reestablish our ability to compete with foreign producers, not only in world markets, but also our domestic market.

However, important as it is to deal with the fundamental factors affecting U.S. competitiveness, we must not overlook those disincentives confronted by U.S. firms attempting to export for the first time or increase their exports. Export trading company legislation which provides a way for businessmen to ensure that they will not run afoul of the banking and antitrust laws in their joint export activities will overcome government regulation that unnecessarily retards export growth.

THE NEED FOR EXPORTING SPECIALISTS

Mr. Chairman, we should acknowledge that exporting is complicated and success requires special effort and expertise. Our competitors abroad have had to learn how to export—small and medium-sized firms as well as large firms—in order to survive. Too large a share of U.S. exports come from large firms. We need a mechanism to stimulate and train these smaller firms in this skill such as their foreign competitors are doing.

With a few notable exceptions, the United States does not have large export trading entities. There are some 700–800 export management companies in the United States—many of them well-managed and successful businesses—and several thousand small export merchants. Not all of these export companies are adequately financed or managed, and many cannot provide a full range of export services, market intelligence, and knowledge of local business practice.

We need export trading companies that provide a full range of export services to firms of any size interested in exporting. These exporting companies must be sufficiently capitalized to allow operations on a scale that would achieve substantial economies in selling and distributing. These companies must be large and experienced enough to develop new markets for U.S. goods.

Large manufacturers already export extensively and typically have spent time and money building up overseas networks which our smaller U.S. companies have not been able to afford. We need a mechanism for mobilizing the untapped export resources of thousands of our small and medium-sized firms which produce goods and services that would be competitive in the world marketplace.

EXPORTERS NEED ASSURANCE ON JOINT EXPORTING

Mr. Chairman, as mentioned at the outset, the Administration supports both the banking and, in general, the antitrust provisions of H.R. 1648. The Attorney General, Secretary of Treasury and the U.S. Trade Representative endorse the concept of export trading companies embodied in this bill. However, I will focus my formal comments before this Committee on the antitrust aspects of the legislation.

The bills before us today (H.R. 1648, H.R. 2326, H.R. 1799, H.R. 2123 and H.R. 1321) offer several different approaches to the important issue of the kind of assurance export trading companies need that their export-related activities are permissible under U.S. antitrust laws. Our view is that the success of export trading company legislation will depend on giving exporters substantially greater assurance than they now have.

One of the major continuing weaknesses of the Webb-Pomerene Act has been its failure to give a clear definition of what conduct would so affect the domestic market as to violate the antitrust exemption. In our efforts over the years to promote the formation of Webb-Pomerene associations, we have heard from the business community the opinion that many U.S. companies have abandoned plans for joint exporting at an early planning stage because they did not have sufficient confidence in its antitrust exemption.

We believe that export trading companies can play an important role in increasing U.S. exports, and that greater certainty in the scope of the antitrust exemption is necessary to encourage formation of export trading companies. We also believe that the antitrust exemption should be as broad in scope and certain as possible without undermining antitrust enforcement in domestic markets.

Thus, we favor adoption of Title II of H.R. 1648, with minor modifications. Although H.R. 2326 may provide more antitrust certainty than is presently available, those forming an export trading company will want the maximum degree of confidence in the antitrust exemption. For these companies, the certification of Title II offers a far more satisfactory solution—a certificate which lists those activities deemed within the scope of the antitrust exemption and offers maximum protection from treble damage suits.

Furthermore, certification assists antitrust enforcement. All the information necessary to support an exemption has to be supplied and evaluated. It is all up front and available to the enforcement agencies. We urge the Committee to adopt a certification procedure along the lines of Title II of H.R. 1648. Since H.R. 1321 does not provide a certification procedure, and H.R. 1799 and H.R. 2123 do not have an export benefits test, we do not support those bills.

THE CERTIFICATION PROCEDURE

In our view, the antitrust certification by the Department of Commerce, in effect a kind of antitrust preclearance, is an acceptable compromise of competing interests—the one, to encourage U.S. companies to form ETCs and increase exports; and the other, to insure that antitrust enforcement can protect the domestic economy from potential anticompetitive spillover. The guiding purpose of H.R. 1648 (and S. 144) is export promotion. The proposed certification procedure is limited to that goal, since no certification can issue unless a proposed ETC would serve to preserve or promote U.S. export trade.

With regard to the procedure for issuing certificates to export trading companies and Webb-Pomerene Associations, the bill recognizes that basic responsibility for antitrust enforcement and expertise in antitrust law both lie in the antitrust enforcement agencies. Consequently, it gives the Justice Department and the Federal Trade Commission an essential advisory role in the certification procedure. We believe it is important that the fundamental authority to enforce the antitrust laws remain as it is today.

We believe Title II meets substantially all these requirements. It generally maintains separation of enforcement and certification functions, and antitrust enforcement authority would remain in the Department of Justice and the FTC. Since we expect to consult fully with the enforcement agencies on the antitrust aspects of proposed joint export activities and the development of guidelines, I can assure you that the Commerce Department will administer the certification procedure of Title II in accordance with competitive principles.

Finally, we are convinced that the substantive antitrust standards covered by H.R. 1648's antitrust exemption (Section 2 of the amended Webb-Pomerene Act) are limited to codification of existing law. By clarifying what kind of joint export activity is permitted under U.S. antitrust law, we will be reducing the uncertainty which U.S. firms face in competing abroad.

OTHER ISSUES

I would also like to offer a brief comment on the antitrust exemption for the export of services. As you know, the Webb-Pomerene Act now covers export of "goods, wares, and merchandise." Title II of S. 1648 would add services to the list of qualified exports for export trading companies. We believe including the reference to services in the Webb-Pomerene antitrust exemption itself is desirable, and will help clarify the scope of the exemption. This approach we believe preferable to including a reference to export of services in an amendment to the Clayton Act.

We understand that the Committee has also requested the Commerce Department's views on the advisability of creating a review commission to study international antitrust issues. As we understand current thinking, the bill would resemble S. 1010, which passed the Senate near the end of the 96th Congress.

The Commerce Department believes some of these issues, particularly extraterritorial enforcement of U.S. antitrust laws, would benefit from further study. However, we believe that further study of the Webb-Pomerene Act and joint exporting by a commission is unnecessary, since both have been the subject of extensive review by both the Congress and the Executive Branch over the last two years. It would be especially regrettable if such a commission study led to delay in enactment of export trading company legislation.

ETC LEGISLATION SHOULD BE ADOPTED

In summary, Mr. Chairman, we believe export trading companies can play an important role in expanding U.S. exports. We urge the committee to adopt the provisions of Title II of H.R. 1648. I must note before closing that the Administration opposes sections 106 and 107 of the bill, the two provisions on financing. As we all strive to reduce government spending substantially, we cannot support new appropriations or authorizations for expenditure programs. Furthermore, we believe we could administer Title II of this bill within our International Trade Administration without major additional resources. Therefore, we feel it is unnecessary to require legislatively the establishment of a special Office of Export Trade to carry out the certification and promotion functions.

Mr. RODINO. Thank you very much, Mr. Secretary.

Mr. Secretary, in your testimony you indicate that the administration in general supports the antitrust provisions of H.R. 1648. What is the reason for this qualification of H.R. 1648?

Secretary BALDRIGE. When I say "in general"?

Mr. RODINO. Yes.

Secretary BALDRIGE. There are some technical points—that do not seem to us at the moment to be anything more than that—the Justice Department has with the way the bill is set up. But they have in effect signed off on the bill and the idea behind it. They have reserved the right to make some technical adjustments.

Mr. RODINO. You are aware that the Assistant Attorney General for Antitrust, William Baxter, testified before the Senate Judiciary Committee and stated that he had some concerns about H.R. 1648. Could you share with us what those concerns might be?

Secretary BALDRIGE. The only ones I know of, sir, because they have backed the concept, would be, beside merely technical ones, I think the idea of the size of the companies involved. I would have to check to make sure of that, but I think that is something we can work out.

Mr. RODINO. Mr. Secretary, we have a number of bills before us, and recognizing that this is a process that these bills go through, we'd like to, of course, insure that we are going in the right direction. Mr. McClory and I, after having for a period of time discussed with the previous administration and its representatives, both the Commerce Department and other agencies of Government, found that, very frankly, there were a lot of concerns which we had about the possibility of antitrust violations, about the bureaucracy that would be created as a result of the requirement that there be certification, the need to identify what that certification might be all about, and the impossibility of itemizing what you would be certifying without being overly broad.

So we came to the conclusion after serious study that we ought to go forward with something in order to provide a basis for action by an industry. And we'd like to aggressively get into export trading and compete in the markets, both foreign and domestic, without violating antitrust laws.

So we introduced H.R. 2326. Although we are the authors, we have nevertheless not just pride of authorship, but an agreement on what should be seriously considered.

Let me ask you: When you compare the bills and the basic requirements of H.R. 1648, the need for what we believe to be expanded bureaucracy—and we are talking about the bureaucracy that presently exists—don't you think as a general proposition we ought to be looking in the direction of that which will do the job and do it adequately, even though, of course, there may be concerns on the way?

And don't you think that we ought to take bureaucracy into serious consideration—all the need that there is for more effort in the departments, more setting up of rules and regulations as to what the certification procedures are going to require?

I'd like to know just how you think them out and then say H.R. 1648 is more desirable.

Secretary BALDRIGE. Congressman, on two points that you raised, one of possible antitrust interference and the other on the expanded bureaucracy that might come about, let me address the expanded bureaucracy first.

I believe I can speak with some credibility on this because I have just finished reducing the budget of the Commerce Department by 30 percent. Too much overhead, too much bureaucracy, has always been anathema to me. It has been in the private sector and will continue to be down here.

What we are talking about is an exercise in the comparative virtues of the lesser of two evils.

Right now we are flatout amateurs in this world export business. In the next 10 years, the whole economy worldwide is going to grow less in percentage than it has in the last 10 years. We are seeing sophisticated efforts for exports becoming the rule rather than the exception worldwide.

We see other countries that we are competing with handling their export potential with much more attention to the idea of winning than we are.

In the case of France and Belgium, their export cartels are excluded from the reach of antitrust laws. They don't even have to register an export association. There is no reporting of the activity of export associations or export cartels at all in France and Belgium.

In the United Kingdom, Germany, and Japan, they all have a broad antitrust exemption for joint export arrangements or cartels. They don't require export cartels to even report on their exports or activities.

And we all know the story of the Japanese. They can literally almost do anything.

We are sitting here, in my opinion, sir, and worrying about a rather minor problem, although it's a problem, compared to the major opportunity we have in unleashing the force of our medium and smaller sized companies in the export area.

In the Commerce Department we already have systems to handle the trigger-pricing mechanism for steel, the textile import and export areas that are covered by the whole GATT problem. Our total Export Control Administration is a large department already.

This would not mean creating a new overhead for that kind of work. It would mean adding some volume, no question about it. But I look upon that as a far lesser evil than providing disincentives to the firms that could be exporting.

I don't mean to take too much time in answering, Congressman, but it strikes so many important notes to me. We have 1 percent of the firms in our country doing 80 percent of the exports. For whatever reason we think that our smaller and medium sized companies should export, the fact is they are not, and they are not for a lot of different disincentive reasons. But this bill would address one of them.

As far as the antitrust implications, I have gone through what our trading partners do. I personally think it is ridiculous for antitrust lawyers to be concerned about what happens outside the continental limits of the United States if the bill clearly states it should not lessen competition in the United States.

And I think for a program that is going to work, we have to face the essential problem; our antitrust laws are too unclear and vague. They still allow for treble damage suits, and people just aren't going to get mixed up with that unless they are large companies that can hire a $200,000 a year Wall Street lawyer.

Mr. RODINO. Mr. Secretary, you see, I think we are arguing for the same objective. You are suggesting there are a lot of these firms that could come into these markets, could be exporting, but because there is uncertainty there is the possibility of violating antitrust laws.

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And we are saying yes, we recognize this, although we don't agree that antitrust laws just of themselves are that kind of a deterrent, but there is this kind of question, this confusion, that may exist.

And so we say in our bill that so long as there is not a substantial adverse effect on competition in the domestic markets, then these companies may engage in this kind of a joint venture and do the kinds of things that we feel will expand our international markets without concern as to whether or not there is going to be any such effect out there in the foreign market. You are saying instead, "You firms come in and we'll have a bureaucracy out there that, as you present yourselves and you present what you want to export and you itemize and you tell us, we are going to certify."

I think you are taking a long road. I think you are going to have to let them wait in line. And I think that while you're talking about certification so that their activities don't have any adverse effect on trade or competition in the domestic market or affect pricing in the United States, what we do when we provide this in a policy statement and this kind of legislation, is that we provide that kind of an incentive. We are saying in effect, "You may come in; you may do this kind of trading, providing, however, there is not this kind of an effect on competition which is substantial in the domestic markets."

Very frankly, I think it is a question of approach and a question of which may do it adequately and best. Especially since you're talking about how little we do, that 1 percent of the companies are doing all the export business, almost, I'm saying we want to get underway. Let's adopt a realistic measure.

And I'm not saying that ours is a perfect bill, but let's not get hung up on what could be, instead, a delaying feature.

That is a strong position that I am taking, and I want you to know, as I emphasized in my opening statement, Senator Thurmond, chairman of the Senate Judiciary Committee, and some of the others in the Senate have introduced a companion bill, and we have some cosponsors here. Some of the things we wrestled with are now being smoothed out and resolved, and I hope you take that into consideration in the way you approach some of these matters.

Secretary BALDRIGE. Believe me, I appreciate your efforts very much, sir. I know you are trying and the Congress is trying their best to find the proper answer to this.

Realizing that, may I bring up this point, sir.

I don't know how many of your committee or your lawyers have ever tried to export. I mean you have to look at this through the eyes of the person that is trying to do it. And sometimes the things that, with all of the best intentions, we feel should help don't always help. I am finding that out in the administration every day.

Just take the case of the small manufacturer, medium-sized manufacturer, and let's just take Wichita, Kans. He's got a product he can export to some country that's—let's just call it country X, but they are a nationalistic country.

Under H.R. 2326, which does not have certification procedures, there is no protection, in case he made a real run on the market abroad, from the country that he is exporting to bring a suit against him in this country that would end up in a treble damage suit if it were allowed.

Now, if in any bill you can take away those uncertainties, you have a clearer definition. Right now he is not exempt from suits in this country, but it leaves a great deal of uncertainty in his mind about what damages might be assessed in case of antitrust action that was successful.

And I would add further that that same manufacturer has—and we can argue about whether it is well founded or not, but he has an essential distrust of our antitrust procedures as far as clarity and lack of ambiguity go. He feels he's going to lose because he just doesn't understand there is no way he can understand without being a large firm with a large set of lawyers.

The clearer we can make this process, the more professional we can become. We are trying to help the little fellow, not make it tougher for him.

Mr. McClory. Do you want to yield to me, Mr. Chairman?

Mr. Rodino. Yes.

Mr. McClory. Thank you.

Mr. Secretary, thank you very much for your statement, and you have made your position very clear.

I might mention we also have before another of our subcommittees the issue of regulatory reform. I have been working with the Vice President and my counterparts in the Senate on that subject, because the regulatory process has become so complicated, so complex. As a matter of fact, a number of the measures seeking to reform the regulatory process are themselves so complex, that we may just move from one morass to another morass of bureaucracy and regulations

Now if there are deficiencies in the bill which I am sponsoring, then I'd like to know about them and I would appreciate your suggestions as to how to improve upon legislation.

But you would trade that single-page bill for a 43-page document which requires endless bureaucratic involvement and specifies a multitude of details that have to be complied with in securing a certificate—and then has the Antitrust Division and the FTC consider whether or not the certificate should or should not be granted, with all the potential for disagreement which might occur between agencies of Government. This rather complex process involves many, many pitfalls. I am wondering if we cannot, following the same route that I hope we can apply with regard to regulatory reform, find a direct, simple, nonbureaucratic approach to the business of encouraging exports and eliminating the fears of export businessmen.

I just want to add this one thing, and then I'd appreciate your comments.

It seems to me that it is not really the roadblock of the antitrust laws that has appeared to discourage or hold down foreign exports; it is rather a kind of a fear of the antitrust laws. It serves as a kind of deterrent because people don't fully understand the antitrust laws and what they do.

So, in my opinion, what we should do is simply clarify the application of existing law.

What are your comments?

Secretary BALDRIGE. Well, I think you are dead right, sir, when you say it is the fear of what could happen under antitrust laws. We have had many diligent lawyers laboring in the vineyards for many years explaining our Government's position on the antitrust section.

It is a sort of fear of the unknown. New ground is always being broken. And let me just make the following comment about H.R. 2326: In two sections, H.R. 2326 amends the Sherman Act or excludes from antitrust jurisdiction "conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the United States or has the effect of excluding a domestic person from trade or commerce with such foreign nation."

All right, there is no way for this chap in Wichita I was talking about, in a small company, to know whether—unless it is just a clear-cut, open-and-shut case—there are a lot of gray areas where he does not know if he is going to come back and get bitten with that provision in a U.S. court and assessed treble damages.

The fact is he still has the fear of what to him is the unknown, because you have to make those exclusions.

That is the difference between that and a preclearance that tells him he is on safe ground.

Mr. McCLORY. Well, let me just ask this—and, of course, coming from Illinois, the second largest exporting State in the country, I am very interested in exports.

Do you think there is no value in H.R. 2326, or do you support those exemptions? And do you feel that there needs to be some certificate issued by your Department or by the Department of Justice or the FTC?

Secretary BALDRIGE. Congressman, as I read it, it excludes from antitrust jurisdiction, unless it has a substantial effect, "conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the United States or has the effect of excluding a domestic person from trade or commerce with such foreign nation."

That is not clear enough, sir. There are too many things to worry about with those kinds of phrases. The law is not clear enough to most of these people. There is no clear definition of activity which would violate this exemption, and it simply wouldn't provide sufficient assurance of protection from antitrust, if you are one of these small competitors.

There is a reason why the Webb-Pomerene Act has not been a success. There is a reason why only very few companies have used it. It is fear of the unknown.

Mr. McCLORY. Let me say this: You wouldn't be issuing the certificate if it were going to prevent American companies from doing business abroad, if it were to discourage the competition we want to encourage.

With respect to the certification authority do you believe that if you had a certificate and it actually impeded a competitor from doing business in the domestic market that that would be valid and he couldn't sue?

Secretary BALDRIGE. No, sir. In the first place, I would not propose to do that, of course, but say an error could be made, and that was the effect.

Under the act which we are supporting, the Justice Department can issue—I don't know the right legal term—a cease-and-desist order, a restraining order, and make the company stop immediately. I think that is a protection we need in there.

But the same company, simply because we had made a mistake in certification, if that were to happen, would not then be in the position of having to pay treble damages and perhaps seeing the whole company go down the drain because of that.

So I believe there is adequate protection there. It is just not punishing the offender who does it in good faith.

Mr. MCCLORY. We couldn't prevent a company from suing if they felt they had been damaged as a result of the misapplication of the law under either bill.

But I guess your point is that they'd only be able to recover single damages under H.R. 1648, and you feel that they'd get treble damages under the other one.

Secretary BALDRIGE. I feel that we have to give every bit of possible practical help we have to our exporters. If we really want to get this job done in the next 10 years, I don't think we should start hairsplitting about what kind of protection to give them if we are doing this in good faith.

Mr. MCCLORY. Yes, without hurting other competitors in the marketplace.

Mr. RODINO. I'd like to interject, Mr. Secretary, just so that we know what we are about. First of all, the prospective exporter would have to apply for this certification. The certification would have to be such that if there were a certification granted, just as Mr. McClory has pointed out, we would have to assure that the activity would serve to preserve or promote export trade and would not result in a substantial lessening of competition, and it would not unreasonably enhance, stabilize, or depress prices within the United States of the goods, and not constitute unfair methods of competition against competitors engaged in the export trade of goods, wares, merchandise, or services of the class exported by such association or export trading company.

All of this would have to be checked very carefully. I assume somewhere in your Department, since the certificate would have to issue therefrom, you'd have your attorneys going through this, and all this is going to take time.

And remember, as the gentleman has stated, we certainly are not going to in any way endorse any unfair practices. We are still preserving rights. And we stay with H.R. 2326 because we believe it will still preserve the integrity of the antitrust laws.

But we do it in a simpler way. And when you mention the company owned by a foreign nation, first of all, H.R. 2326 would prohibit that kind of an action. It wouldn't allow that kind of action to be brought here in the United States.

Besides that, H.R. 2326 would give the individual the opportunity, if he wanted to, to go to the Justice Department—and I think the practice is that you can ask for a review letter in a period of 30 days—and there you have a direct answer.

You may want to spell it out precisely, but I think in the effort to try to spell out, you are going to prolong, you are going to create a bureaucracy. But frankly, I think that we are possibly reaching the same objective.

Secretary BALDRIGE. May I answer that, Congressman.

A domestic company can still sue for treble damages under H.R. 2326.

Mr. McCLORY. But, Mr. Secretary, I think if there is a violation under H.R. 1648—a private party who feels it has been injured or a certificate wrongfully issued—I think the treble damages rule would apply equally there. I'd like to recheck that. But if there is a difference with respect to the question of single or treble damages, I'd like to know about it because if we could modify H.R. 2326 to provide that degree of fairness, I certainly wouldn't hesitate to do it.

Secretary BALDRIGE. Yes, and there is also the length of time. Under H.R. 2326 you can go back and get damages from the time it started. Under the bill we are proposing, you could just stop the ball game where it was.

I think the other point is that I have been through personally the preclearance procedure that Chairman Rodino mentioned. That preclearance procedure does not insure the same degree, in my opinion, of freedom from future suits that was represented. There are a lot of loopholes in that kind of a thing.

The Justice Department and the FTC hold all the options open, by and large, or at least that is the perception.

I think it is also important to add that in the Commerce Department we have under the Office of the Chief Economist, a Bureau of Economic Analysis and Bureau of Industrial Research—we already have in place industrial sector studies of all of the major industrial sectors of the United States, market shares, and so forth, that would make this clearance procedure much less cumbersome than one might imagine.

As a matter of fact, we have 90 days to do this, and I believe we can do the job in 90 days.

In addition, it is not just up to the Department of Commerce to give the preclearance. Justice and FTC are also consulted and they have 45 days.

This just makes it a lot simpler. There are more bodies involved, but the clarity and assurance is there, and that means a lot to a small- or medium-sized manufacturer without a big legal staff. They are flatout scared of the Justice Department and the FTC, and maybe they shouldn't be, but I think they are.

Mr. RODINO. The gentleman from New Jersey. I am going to give you 10 minutes and then 10 minutes to the gentleman from Virginia, and then we have to go to the floor for a ceremony.

Mr. HUGHES. Thank you, Mr. Chairman, and thank you, Mr. Secretary.

Just following up briefly on the colloquy you went into with my colleague from Illinois, I think one of the attributes that you point to in H.R. 1648 is the clarity that that it is intended to provide. And I have some misgivings about that, too, because it seems to me that even once a company is certified, if there were some changes in that company's business practices, it would require a new review, possibly a new certification. And then I don't think that even if you accept that it is going to provide an approach to that decisionmaking that is going to exclude litigation.

I would assume that if, in fact, a court were called upon to decide whether a significant anticompetitive impact is brought to bear on the economy that the court is going to have to determine at that point whether or not the actions actually are ultra vires the certification.

So how do you envision that is going to provide clarity and direction under those circumstances for companies that even have been granted certification?

Secretary BALDRIGE. I think that assuming your case, the court would certainly have to take into consideration the expertise that the Commerce Department, Justice, and FTC had all displayed in signing off on whatever the clearance procedure was. I would hope that would weigh with the court more than if that had not been the case.

I would imagine that would be a significant factor in this kind of proceeding.

Mr. HUGHES. It depends on what court you are before.

Secretary BALDRIGE. Yes, and what judge you are before, too, I guess.

Mr. HUGHES. And what day. [Laughter.]

Secretary BALDRIGE. So I think it does give some real assurance, more than would be provided otherwise.

I think also the timing, the fact that it states in the bill that if there is an aggrieved competitor who Justice, FTC, and Commerce felt was being aggrieved because of some change or because of some later facts that came out, or because of some action that wasn't correct, the ability to stop that immediately once it came to the attention of those three agencies would also give some added protection to the company involved.

What we are talking about here is comparative assurance to people who just don't have it now, and we are in favor of doing what we can.

Mr. HUGHES. I suspect that you're right, that the courts would be inclined, I think, to give some weight to any signing off, any decision by Commerce.

But the fact of the matter is I believe that courts would look at any economic damage very closely, and I think there would be a tendency to look very closely at the certificate. And a finding that actions were ultra vires, the certificate I would think, would be the natural course of action on the part of the courts.

So I am not so sure that we are providing the certainty and the clarity that you envision.

Another thing that gives me some difficulty is the prospect of having disputes within the Government, and the possibility of Justice, for instance, securing injunctive relief if they disagreed with a proposed determination. I am not so sure that that is a healthy component of this proposal.

Secretary BALDRIGE. Well, to go back to the first point, sir, I think that with the procedure we are recommending, the fact that not just the Commerce Department but Justice and the FTC have to sign off on one of these should be pretty powerful evidence before any judge. It is not just the Commerce Department acting by themselves.

I am not a lawyer so I can't really give any expert opinion on how a judge would look at that, but it is difficult for me to imagine as a layman that a judge would simply dismiss out of hand the opinions of both Justice and the FTC as well as Commerce.

Mr. HUGHES. However, in that situation where Justice does object, feeling the practices are anticompetitive, but fails to secure the injunctive relief but feels under the circumstances the certificate is in error, the court is faced perhaps down the line with the certification that never received the endorsement or support of the FTC or Justice. Under those circumstances how does the judge view it?

Secretary BALDRIGE. I am not entirely clear myself on this point, so may I make it subject to reservation later.

The Commerce Department is required to consult with Justice and the FTC before issuing a certificate. So if Justice was disturbed and just flat-out against giving a particular certificate, I would certainly not want to go ahead with it. It is just going to lead to trouble. That would not help the export trading company involved—that would not release the uncertainty. I don't see how they could go ahead. I think we would have to have all three agreeing that this preclearance procedure was correct in order to go ahead with it.

And if that were the case, I would think that would have some real ability to document the positive facts in the case if it came up later.

Mr. HUGHES. Thank you, Mr. Secretary.

We do have a procedure at 11 o'clock, and my time is up. The record will remain open so you can supplement your answer to the second question.

Also, I wonder if we can perhaps submit some written questions to you, and perhaps you could respond to us, and the record will remain open for those responses.

The gentleman from Virginia is recognized.

Will the gentleman yield for just a minute. While you were conversing there, I asked you if you would respond to some questions we might put to you in writing that we are not able to reach today.

Secretary BALDRIGE. Yes, I would.

Mr. HUGHES. The gentleman from Virginia has 10 minutes.

Mr. BUTLER. Thank you. Mr. Secretary, we welcome you to our committee and thank you for your testimony.

I did have the impression that you came to the conclusion that here was this bill left over from the Carter administration and we might as well try it.

I am a little bit disappointed that we haven't given more study to this vehicle that was already there. I had some reservations about it and have some reservations today.

That is only a comment.

But yesterday I introduced legislation, H.R. 2812, a bill to amend the Clayton Act to limit the circumstances under which foreign governments may sue for violations under the antitrust laws, you alluded to that general problem area in your testimony, I think, a little bit earlier. But I would appreciate it if you would respond for the record on the administration's views on that legislation.

Of course, you can respond now, but I don't want you to express your views on it hastily.

Secretary BALDRIGE. I can give you my first reaction. I think it is a step in the right direction. I haven't studied the technical parts of the bill, but I must say the intent is something I agree with. But I think it is not the whole answer to the problem we are discussing; it is only part of the answer.

Mr. BUTLER. No; I accept that, and I would like your response on this legislation because we have that general topic before us at this moment, and we may not get you back again to comment.

But turning now to an observation which you made in the course of your exchange with the gentleman from New Jersey, Mr. Hughes, addressing basically the Department of Justice, Commerce, and FTC, why should Commerce be involved in this certification process if Justice has the power or the authority to sign off on it?

Wouldn't it be more appropriate for the responsibility to go to Justice which is an enforcement agency, or to FTC which is an enforcement agency, rather than Commerce, but perhaps with the signing off to be in Commerce?

Secretary BALDRIGE. If you want an answer, Congressman, it depends on whether you want to aid this process or impede it.

I think the Commerce Department has a dedication here to help all we can in the legitimate increase in exports, legitimate and legal. It is the trust of the Department—it is a great concern of ours. This country can get eaten up by the wrong-way balance of payments in the next 10 years. We are going to be facing increasingly tough competition.

Our desires there are clear and well known. I think that the Justice Department and the FTC, in combination with Commerce, provides the balance that is necessary in this preclearance procedure.

But I've got to say, sir, if it was left to Justice or the FTC, I do not think the intent of this bill would be carried out as well as if Commerce were involved.

Mr. BUTLER. I suspect the record bears you out on that.

Secretary BALDRIGE. I'm sure it does.

Mr. BUTLER. The parallel we draw when you put promotional and regulatory functions in the same department is that under the Capper-Volstead Act the Department of Agriculture is charged with administration, and for over 59 years they have failed to find a single instance of undue price enhancement by nonagricultural co-op.

That conflict of interest between regulation and promotion raises real doubts in my mind. So I have to concede that the record bears you out in that regard. But those of us who are concerned about antitrust enforcement have some apprehension.

Secretary BALDRIGE. Yes, sir, but I do think the Commerce Department is different in that respect. We already have the whole export control area where certainly we want to increase exports, but we are responsible for control of exports that either legally or by treaty should not go out. We are already used to dealing with that kind of problem. And I haven't heard any criticism of the

Commerce Department's handling of that except for the slowness in getting the export licenses through. I haven't heard any major criticism of their favoring business or whatever. That is a very dedicated Department. We just don't have enough people there now.

Mr. BUTLER. I certainly agree with you there, with respect to their dedication. But is there now a cadre of attorneys with antitrust expertise within the Department of Commerce? Or what do we do about that?

Secretary BALDRIGE. The expertise in the Department of Commerce consists in its knowledge of the marketplace, what statements can be made by companies—well, our ability to assess the validity of the statements of the companies coming in as far as market share, potential damage to competitors, competitive aspects, and so forth.

Our General Counsel to be, I hope, if he ever gets through this whole clearance procedure——

Mr. BUTLER. That's a Senate problem. [Laughter.]

Secretary BALDRIGE [continuing]. Has had considerable antitrust experience.

I don't claim we have a body of antitrust lawyers at Commerce. But I'm sure that the Justice Department and the FTC will be coming forward with perhaps more than an adequate share of antitrust expertise on this.

Mr. BUTLER. Well, leaving that for the moment and turning to the antitrust laws, it has been the custom to complain that the antitrust laws are uncertain. Most transactions pertain to domestic commerce, but this bill would apply only to exports. Is precertification really justified for just a small segment of our commerce, or is this just the first of a series of bills which later on will suggest that maybe domestic commerce could be accelerated by a precertification process?

Secretary BALDRIGE. Congressman, I cannot foresee that ever coming about. Of course, I could be wrong, as I frequently am on many predictions.

But this is clearly designed for export. That is the only thought we have had in putting it forward. And it is because our competitors, who are whipping us every day, are working under a set of laws that I mentioned earlier where they don't have to report any export cartels, any export associations, even any exports.

We are fighting this trade war with one hand tied behind our back. And we are talking about exports now, not the domestic economy. I would not propose to see this extended to the domestic economy.

Mr. BUTLER. I am getting some help from that, but that is not a response.

Mr. Goldsweig will testify that the uncertainty has been created by the Webb-Pomerene Act, that many U.S. companies avoid registration under that act for fear it will only serve to make them a target for Justice Department inquiry regarding their activities—and so forth.

My question to you is, if that is a factor, that the avoidance of registration is a reason for limited use of the Webb-Pomerene Act, then with the additional certification which the administration's legislation proposes, is not the same problem aggravated?

Secretary BALDRIGE. No, sir, I don't believe so. In the first place, I am not sure that is the right reason for the Webb-Pomerene Act's lack of use, if I may use that term. I think it is really because the act is vague enough and people aren't certain enough about its advantages that it hasn't been used more.

The preclearance procedure, on the other hand, would be very clear to the companies involved.

But, of course, there is more to the Export Trading Company Act than that. We haven't touched in this committee here on the advantages of allowing a bank to have some equity and some smaller manufacturing companies to have some equity. Some smaller manufacturing companies that can't export now could get together with a bank without this overriding fear of antitrust. It is just illegal for them to do that now. And this would clear that and make it clear they could do this, get the preclearance certificates.

I don't know how you could have 10 companies get together with a bank and not have this known. I don't think anybody could duck around the corner on that one.

Mr. BUTLER. Well, I gather from your response that you don't accept the suggestion that many companies avoid registration under the Webb-Pomerene Act for fear it would possibly trigger an investigation by the Justice Department of their activities.

Secretary BALDRIGE. If that is true, sir, I am not aware of it. I have been in business for 30 years.

Mr. BUTLER. I won't quarrel with you.

Are you trying to tell me my time is up?

Mr. HUGHES. Just about.

Mr. BUTLER. I have one more question, if I may.

We have before us a "Review of the Executive Branch Export Promotion Functions and Potential Export Disincentives" submitted by your predecessor, Mr. Philip Klutznick, and Reuben O'D. Askew, U.S. Trade Representative, in July 1980, and that review found five major categories of disincentives in the export area.

No. 1, export and reexport controls.

No. 2, taxation of foreign-earned income.

Third, the Foreign Corrupt Practices Act.

Fourth, the environmental and safety programs and regulations.

And fifth, other potential export disincentives, including cargo preference requirements; ocean freight rate differentials; and extraterritorial environmental reviews.

It was specifically stated that the application of the antitrust laws to certain types of international transactions also concerned exporters, but no specific instances were shown where these laws unduly restricted exports.

Now, my question to you is: If we wish to facilitate export trade, doesn't this suggest that there should be a greater legislative priority given to some of these other obstacles rather than to establishing this extensive procedure to shield export activities from antitrust action?

Secretary BALDRIGE. Congressman, it is like if you want to win anywhere, you want to be a professional, not an amateur. That consists of not doing one or two or three things. It consists of getting to the root of the problem and doing everything you can if we want to win in the next 10 years in our export race. When I say "win," I don't mean drive everybody else out of business, I mean just keeping our share.

We have to attack everything you mentioned there, but the biggest single item is the fact that our competitors have their medium and smaller sized companies in the export business. They are all experts at exporting to a much larger extent than the United States is. We are not using but 1 percent of our resources in this, and we've got to be able to do so.

If you take this man in Wichita I mentioned or El Paso or wherever, and he is a small- or medium-sized company, sure, he's worried about all the things you're talking about. He is perhaps more worried about where he gets his financing, how he gets an introduction to the marketplace abroad, how he gets through the redtape involved, what kind of marketing is necessary, and so forth. The only way a small- or medium-sized manufacturer who cannot afford to send a man over there or a group of people or set up a distribution system can possibly do that is by getting together with a bunch of other companies with the same problem and a bank with some expertise abroad and the ability to help financing at home.

That won't solve the whole problem. That is just one of the many steps we have to take. But he needs that aid to be able to get at the action he is going to have to take. And to do that we need an Export Trading Company Act, and part of getting that done is having the proper antitrust clearance as well as the banking clearance ahead of time.

So this is just one part of a large problem. It is like being professional in anything. You have to get at all these things. There is no use ranking them in an order of priority. Any one of them will put you behind in a race with our competitors because they've got them already.

Mr. BUTLER. Thank you, Mr. Secretary. We appreciate your testimony. I don't want you to think my questions represent hostility, but I do have some concerns about this legislation.

Mr. HUGHES. Mr. Secretary, I don't know what your own schedule is, but we are going to have to recess very shortly.

Mr. Seiberling, did you have questions?

Mr. SEIBERLING. I just want to ask one question of the Secretary. I apologize for not being here sooner.

As I read the Rodino bill, H.R. 2326, it seems to me it would give an illusory protection. If the enterprise in question were not particularly successful so that it didn't have a substantial effect, then it would have protection. But if it became very successful and large, then the protection would evaporate.

Do you have that same feeling?

Secretary BALDRIGE. Yes, sir. We have the feeling that there will be more lawyers employed under H.R. 2326 in the next 10 years than there would be under the bill we are backing.

Mr. SEIBERLING. Having practiced in the antitrust law, particularly in the foreign field, for many years before I came to Congress, I know there are many problems. The problems would be worse if the Justice Department enforced it rigidly than if they had some flexibility. But I think if you are going to do anything—and I am not sure what we should do at this point—you are going to have to do something that gives certainty to the companies involved. Otherwise they are not going to get much out of it.

And your proposal, I assume you support H.R. 1648; is that correct?

Secretary BALDRIGE. Yes.

Mr. SEIBERLING. That bill does seem to me to have the merit of providing much more certainty. Whether it would result in an overall competitive approach, I don't know——

Secretary BALDRIGE. Yes, sir, I testified to that earlier today, that I believe it provides more certainty.

And if I may add, there is always one statistic that's stuck with me. In the case of Japan, which is clearly more successful in exporting than we are and have been, they are graduating four times as many engineers per capita as the United States. And the United States, on the other hand, is graduating 20 times as many lawyers per capita as Japan. And I think that tells us something about the problem here.

Mr. SEIBERLING. Thank you. I do want to support the principle of eliminating as many roadblocks as possible to export trading.

You have made mention of other countries which don't have the impediments that we seem to have. Do they have any certification process which requires companies that do export to get a certain certificate from an agency such as the Department of Commerce?

Secretary BALDRIGE. France and Belgium have export cartels that are excluded from the reach of antitrust laws. There is no registration of export associations necessary and no reporting of exports or export cartels necessary to the government.

In the United Kingdom, Germany, and Japan they have very broad antitrust exemptions for export companies and cartels. They do have registration of the cartels, but they do not require export cartels to report exports or activities.

So that is what we are fighting.

Mr. HUGHES. Mr. Seiberling, did you have any further questions?

Mr. SEIBERLING. Well, I have one question.

Mr. HUGHES. We are going to have to recess. We are due on the floor in 5 minutes. Can we perhaps ask the Secretary——

Mr. SEIBERLING. Let me ask him the question. If he can answer it in a few words, fine; if not, he can do it later.

Have you considered the possibility of legislation such as the British Restrictive Trade Practices Act, under which a government agency would review the particular industry or the particular question, lay down some guidelines, and then grant whatever exemptions are necessary from that point on, and as long as they live within the guidelines they are OK; if they violate them, then it's a violation of the act.

That has a lot more flexibility even than H.R. 1648. Was any consideration given to that kind of approach?

Secretary BALDRIGE. No, sir. I'd be glad to study that, but I think that could present its own problems to me.

Mr. SEIBERLING. Yes, of course. I will see what some of our antitrust lawyers say.

Mr. HUGHES. Thank you.

Mr. Secretary, thank you very much. We appreciate very much your testimony.

Mr. HUGHES. The committee will stand in recess until 11:30.

[Whereupon, a short recess was taken.]

Mr. RODINO. The committee will come to order.

I invite the other witnesses who are to appear today to please come to the table, and we will invite you to testify as a panel. And what we suggest is that each of you—probably Professor Fox being first—might take 5 minutes in presentation, and then the committee members will ask questions after all of you have made your presentations.

We have Prof. James A. Rahl, professor of law, Northwestern University; Prof. Eleanor Fox, professor of law, New York University—and I will note that Professor Fox served with me, Mr. McClory, and others as members of the President's Commission on Review of the Antitrust Laws, and we welcome you here—David Goldsweig, Office of the General Counsel, General Motors; and Mr. A. Paul Victor of Weil, Gotshal & Manges.

You may proceed, Professor Fox.

TESTIMONY OF PROF. JAMES. A. RAHL, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY; PROF. ELEANOR FOX, PROFESSOR OF LAW, NEW YORK UNIVERSITY; DAVID GOLDSWEIG, ESQ., OFFICE OF GENERAL COUNSEL, GENERAL MOTORS CORP.; AND A. PAUL VICTOR, ESQ., WEIL, GOTSHAL & MANGES

Ms. FOX. Thank you, Chairman Rodino. It is a pleasure to be here before you today.

I share the concern of the drafters of these various bills with the disappointing performance of U.S. firms and with our seriously large trade deficit. I am gratified to know that Congress is dealing with these problems.

As for the antitrust aspects, it has never been shown that antitrust is a significant disincentive to exports, and indeed the major thrust of H.R. 1648 is not to revise antitrust but to encourage exports by small, medium-sized, and minority businesses by facilitating financing and the flow of information. Access to financing and better information should induce small, medium-sized, and minority firms to seize and participate in opportunities for effective and efficient marketing abroad.

The antitrust question is ancillary, if indeed it is a question at all. The question is: What should we do to cure the perception that antitrust is an obstacle to collaboration necessary to improve the efficiency of export activities? One approach to the question is H.R. 2326, sponsored by Congressmen Rodino and McClory. A second approach is H.R. 1648, title II, on which we heard much testimony this morning. I wish to testify today in favor of the approach of Congressmen Rodino and McClory and against title II.

Let me mention what I believe are some major benefits and costs of each approach.

First, the Rodino-McClory approach is simple. It identifies precisely the problem and addresses it. It does so in the usual tradition of antitrust—statutory language that does not require regulatory, administrative intervention and decisionmaking.

The bill, as I understand it, is intended to make two things clear: First, that the U.S. antitrust laws do not protect foreign consumers against breakdown of competitive conditions in foreign countries; and, two, the U.S. antitrust laws do not protect foreign producers against loss of competitive opportunities in foreign countries.

While protection of competition in foreign markets may be a worthy objective, it is not our concern. We do not, and should not seek, thus to export American antitrust.

I will suggest some language which I think will make the Rodino-McClory bill clearer along these lines.

I will first address what I feel to be major costs of title II.

As we heard the testimony this morning, it became even more clear to me that title II entails more regulation and more bureaucracy. The costs, burdens and delays that will be caused by this increased regulation seem apparent. Filings are required, and more filings must be made upon any significant change in circumstances. Waiting periods are necessary. Coordination among and duplication by three different regulatory bodies or officials is contemplated. Certification, amendment, revocation, decertification, appeals, guidelines and rules and regulations are all built into the statute. Indeed, the whole procedure seems to sound very much like the kind of procedure the new administration has said it is against.

In spite of the detail and the promise of antitrust protection under title II, an association would not even be eligible for certification if it restrains trade within the United States; and even if it got an exemption it would not be protected except "with respect to its export trade, export trade activities, and methods of operation" specified in the certificate and carried out in accordance with its terms and conditions.

I conclude that title II contemplates much too much, and wholly unnecessary, Government intervention, while the Rodino-McClory approach does the whole job simply, and with no bureaucracy.

I do believe that the language of the Rodino-McClory bill could be clarified and made perhaps even simpler, and I have taken leave to suggest amendatory language.

If there should be a clarification regarding the limits of U.S. antitrust, the clarification should apply to all American competition laws, including the entire Sherman Act, Clayton Act, and Federal Trade Commission Act. And as to each I would propose the following language in place of the language in the Rodino-McClory bill, and I hope that you will consider it. This is the language that I propose:

> This Act shall not apply to protect foreign buyers, suppliers, or competitors allegedly injured or threatened with injury by restraints on trade or commerce with or within any foreign nation.

This language would take care of a problem that Secretary Baldrige mentioned—the fear small American companies might have that foreign governments or foreign consumers might sue their export companies for alleged restraints in the course of export activity. It would also avoid problems that may be raised by the language of H.R. 2326 which may be read to implicate liability standards and comity issues.

Also, Secretary Baldrige mentioned that the business review letter gives little security, and Congressman Butler mentioned—a point I entirely agree with—that if there is any problem of antitrust uncertainty in the export area, that is a very small part of the gray area of antitrust. Why should we simply be looking at the gray area in export trade alone?

Indeed, the logical result of Secretary Baldrige's argument is that we should provide a regulatory exemption procedure for every problem in the gray area of antitrust where activities might conceivably promote productivity. I'd like to look at this question of uncertainty in the larger picture. I think we should consider giving more protection to recipients of favorable business review letters during the time that review letter is outstanding. One suggestion is a statutory change which would give protection to such recipients against treble, but not single, damages and against criminal prosecution for all acts covered during the time the business review letter is outstanding.

Beyond these two protections, one, a statutory amendment to limit applicability of U.S. antitrust with respect to restraints in foreign commerce, and two, greater protection to recipients of favorable business review letters, I do not think it is appropriate to tinker with our antitrust laws, because we will be intruding upon the protection of American consumers.

Thank you.

Mr. RODINO. And we will be including your statement in the record in its entirety.

[The complete statement follows:]

STATEMENT OF ELEANOR M. FOX, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW ON THE ANTITRUST IMPLICATIONS OF H.R. 2326 AND H.R. 1648

I. INTRODUCTION

My name is Eleanor Fox. I teach at New York University School of Law, I am Chair of the Section on Antitrust and Economic Regulation of the American Association of Law Schools, I am past Chair of the Section on Antitrust Law of the New York State Bar Association, and I served as a member of President Carter's National Commission for the Review of Antitrust Laws and Procedures.

I thank you for inviting me to testify here today.

First, let me express my agreement with the drafters of the various related bills to facilitate exports. I share the concern with the disappointing performance of U.S. firms and with seriously large trade deficit. I am gratified to know that Congress is dealing with these problems.

It has never been shown that antitrust is a significant disincentive to exports, and indeed the major thrust of H.R. 1648 is not to revise antitrust but to encourage exports by small, medium-sized and minority businesses by facilitating financing and the flow of information. Access to financing and better information should induce small, medium-sized and minority firms to seize and participate in opportunities for effective and efficient marketing abroad.

The antitrust question is ancillary, and is relatively simple: What should we do to cure the perception that antitrust is an obstacle to collaboration necessary to improve the efficiency of export activities? One approach to the question is H.R. 2326, sponsored by Congressmen Rodino and McClory. A second approach is H.R. 1648, title II, sponsored by Congressmen La Falce, Gibbons and Hinson. I come here today to testify for the approach of H.R. 2326 and against H.R. 1648, title II.

II. THE RODINO-MC CLORY APPROACH IS MORE EFFICIENT AND EFFECTIVE THAN H.R. 1648, TITLE II

Let me review the major benefits and costs of each approach.

First, the Rodino-McClory bill. This bill precisely identifies the problem and addresses it. It does so in the usual tradition of antitrust—statutory language that does not require regulatory, administrative intervention and decision-making.

The bill, as I understand it, is intended to make two things clear: (1) The U.S. antitrust laws do not protect foreign consumers against breakdown of competitive conditions in foreign countries, and (2) The U.S. antitrust laws do not protect foreign producers against loss of competitive opportunities in foreign countries.

While protection of competition in foreign markets may be a worthy objective, it is not our concern. We do not, and should not seek, thus to export American antitrust.

The Rodino-McClory bill thus has the benefit of making our law clear in a way that it ought to be clear, and by this clarification it removes a disincentive that comes from misunderstanding or lack of information.

The Rodino-McClory approach has no costs, unless: (1) we count as a cost harm to foreign consumers of a sort that the foreign nation itself does not recognize, or unless (2) we count as a cost a transaction foregone because it is likely to hurt American consumers.

I do not count possible higher prices to foreign consumers as a cost. The foreign nation itself has the right to adopt competition law if it wishes to do so, and where such law exists our producers must honor it. As to the second—transactions foregone—I would make two points. First, it is very important to protect American consumers. Second, if small and middle-sized firms wish to organize an export venture of a size necessary to realize scale economics, they can do so in a manner that does not threaten harm to American consumers. The export interests and the consumer interests do not conflict.

I conclude that the Rodino-McClory approach has benefits and no costs.

I have quite a different view of Title II of H.R. 1648. Title II is more regulation and more bureaucracy, and does not even hold the certainty it promises.

The costs, burdens and delays that will be caused by the regulation seem apparent. Filings are required, and more filings must be made upon any significant change in circumstances. Waiting periods are necessary. Coordination among, and duplication by three different regulatory bodies or officials is contemplated. Certification, amendment, revocation, decertification, appeals, guidelines and rules and regulations are all built into the statute.

In spite of the detail and the promise of antitrust protection, an association would not even be eligible for certification if it restrains trade within the United States; and even if it got an exemption it would not be protected except "with repect to [its] export trade, export trade activities and methods of operation" specified in the certificate and carried out in accordance with its terms and conditions.

I conclude that Title II contemplates too much, and wholly unnecessary, government intervention, while the Rodino-McClory approach does the whole job simply, and with no bureaucracy.

III. THE RODINO-MC CLORY BILL SHOULD BE FURTHER CLARIFIED AND SIMPLIFIED

I should like to devote my remaining comments to suggestions for improvement in the language of H.R. 2326, and, finally, to an additional suggestion for greater business certainty.

If there should be a clarification regarding the limits of U.S. antitrust, I believe the clarification should apply to all American competition laws, including the entire Sherman Act, Clayton Act, and Federal Trade Commission Act. Second, I would prefer language that simply makes clear the limits of our law, rather than language that could be read to implicate liability standards and comity issues. One proposal would be the following amendment to the Sherman Act, the Clayton Act and the Federal Trade Commission Act: "This Act shall not apply to protect foreign buyers, suppliers or competitors allegedly injured or threatened with injury by restraints on trade or commerce with or within any foreign nation."

IV. GREATER PROTECTION SHOULD BE ACCORDED BUSINESS REVIEW LETTERS

Finally, I offer one additional suggestion. My suggestion derives from my view of a larger picture. Businesses complain that the antitrust laws are not sufficiently clear; that they do not know what they can do, and that uncertainty causes them, and the nation, to lose opportunities for greater productivity and progressiveness, including opportunities for greater inroads abroad. The Justice Department has a business review procedure. Indeed, it offers expedited treatment for international transactions. Yet its business review procedure is seldom used, since businesses and their lawyers perceive that they have little to gain and more to lose.

We should seriously consider granting more protection to the recipient of a favorable business review letter. One suggestion would be a statutory change providing that the recipient of a letter is protected against treble (but not single) damages and against criminal prosecution for all acts covered by the business review letter and undertaken during the time such letter was in effect.

Export transactions are not the only transaction, or even a significant part of transactions, that may fall with the grey area of antitrust. Title II is merely a tail wagging a dog; and it may even be the wrong tail.

Mr. RODINO. You may proceed, Mr. Victor.

Mr. VICTOR. Thank you, Mr. Chairman. I appreciate the opportunity to be here and offer some observations.

Before I review the proposals which are pending, I would like to make two preliminary observations.

In the first place, the purpose of the legislation, which is to promote exports by providing greater certainty, especially to small- and medium-sized companies, concerning the potential antitrust consequences of joint export conduct, I think is laudable. And I commend this subcommittee for considering ways of improving our situation.

On the other hand, I am really not sure that it is necessary to rush into making changes at this very moment.

Exports, as I understand it, are doing quite well. There was, in fact, a small surplus last year on an overall basis, and there was a considerable surplus of some $34.4 billion in services.

The real problem, it seems to me, concerning our balance-of-payments situation is an excess of imports, and especially imports of high-priced oil.

Also, although there seems to be a perception that uncertainty over U.S. antitrust law application to joint export activity impedes such commerce, there is really very little proof to point to to support that view. Indeed, as Congressman McClory pointed out when he introduced H.R. 2326, a study by the Commerce Department and the Special Trade Representative, "expressly did not include the antitrust laws among the major trade disincentives, and no specific instances of those laws unduly restricting exports was shown."

Moreover, I think there is very little judicial precedent to point to to demonstrate undue concern when two or more competitors wish to join together to target conduct on a foreign market, rather than on U.S. competition.

For these reasons, rather than rush into legislation now, I would like to urge respectfully that Congress promptly enact another piece of legislation pending before you, H.R. 2459, a bill to establish a commission to study the international application of the U.S. antitrust laws. That commission would be studying the precise issues which this subcommittee is currently addressing. And I agree with Congressman McClory and believe that Congress should await the guidance expected from that commission, including the legislative recommendations, so as to insure that only necessary changes will be made in the most meaningful manner possible when amending our antitrust laws.

If, nevertheless, Congress does deem it appropriate and necessary to proceed on some export promotion legislation now—and I recognize how quickly the Senate is heading in that direction—I have a clear preference for the approach contained in H.R. 2326 over that reflected in H.R. 1648 and other bills, since I have serious doubts that the best solution to eliminate the perception of antitrust constraints on joint export activity is to establish a new regulatory system in a nonantitrust agency, the Commerce Department, and ask that agency interfacing with Justice to make many antitrust determinations whose ultimate validity will still be tested in the courts if somebody feels they are truly aggrieved by what is happening.

The problems that I see with 1648 include a very complex and uncertain certification proceeding. It would take some 3 to 6 months. It might even inhibit export opportunities requiring prompt action. The uncertainty is put in the hands of regulators rather than the courts, at least initially, and there is a potential dichotomy between Commerce and Justice. To me that doesn't make any sense whatsoever. The certification procedure could be complicated, expensive, burdensome, and counter to the climate of deregulation which we are all aware of today. It might even act as a deterrent to some joint conduct by the small- and medium-sized companies that it is actually designed to help. And I don't think it will do away with the need for sophisticated antitrust counseling, in all candor.

By contrast, to me at least, 2326 is a better mechanism. It goes to the heart of clarifying the underlying antitrust laws themselves to make it clear those laws are not to apply to U.S. commerce with foreign nations unless there is a substantial and foreseeable adverse effect on U.S. domestic commerce. It eliminates expenses in complying with complicated regulations. It signals sufficient certainty regarding the intended scope of our antitrust laws vis-a-vis export trade, and it is consistent with existing Justice Department enforcement policy.

If the 2326 approach is taken, I'd like to suggest that the foreseeability concept be worked into its language to accord with the intent aspects of the *Alcoa* case. I'd also like to suggest a parallel amendment to the Federal Trade Commission Act and, as Professor Fox has stated, the other antitrust laws, so there would be identical antitrust jurisdiction. I would like to further suggest that the Webb-Pomerene Act then be repealed for it would have no purpose whatsoever.

And I might also suggest, if it is important in the wisdom of Congress that some mechanism be provided to allow banking organizations to get involved in joint export activity, that perhaps something like title I of the bill, about which I am not an expert, might be appropriate.

To sum up, I commend the Congress for considering this important problem now. I hope that 2459 will be promptly passed and that the enactment of so-called export promotion legislation will await the recommendations of that study commission so that the United States can develop the most cohesive, comprehensive, and efficacious policy for guaranteeing this Nation's international competitiveness in the remaining decades of this century.

Thank you very much.

Mr. RODINO. Thank you.

[The complete statement follows:]

STATEMENT OF A. PAUL VICTOR, PARTNER, WEIL, GOTSHAL & MANGES

Mr. Chairman and Members of the Subcommittee, my name is A. Paul Victor and I am a partner in the law firm of Weil, Gotshal & Manges. Since 1963, I have practiced antitrust and international trade law, first with the Antitrust Division of the U.S. Department of Justice, then in private practice in Washington, and for the past 12½ years, with my law firm in New York.

Since August of last year, I have been Chairman of the International Trade Committee of the American Bar Association's Section of Antitrust Law. It is in that capacity that I became particularly interested in the issues raised by H.R. 2326, H.R. 1648, H.R. 2459, and the other legislation before you. My Committee is currently studying these proposals, and we hope to be able to provide you with comments during the course of further consideration of these bills. For now, however, I must make it clear that I am appearing not as an ABA representative but rather on my own behalf to offer a few personal observations on the antitrust aspects of the legislation pending before you.

Before reviewing the proposals, I would like to make two observations. First, there is no doubt that the purpose of both H.R. 2326 and H.R. 1648—to promote U.S. exports by providing greater certainty, particularly to small and medium size companies, concerning the potential antitrust consequences of joint exporting activity—is commendable and important. As the Chairman and Ranking Minority Member both emphasized in their remarks when H.R. 2326 was introduced, legislation which can meaningfully improve our export activity should be seriously considered.

On the other hand, I would also like to note that the need for immediate changes in the antitrust laws in order to promote exports is not all that clear. Basically, American exports are doing quite well. According to figures reported last Friday, the United States actually had a small current-account trade surplus in 1980, the first time since 1976 that this occurred. Moreover, exports of services were particularly strong, with a surplus of some $34.4 billion for 1980. Our real pressing problem in trade seems to be not lack of exports, but an excess of imports spurred essentially by the rising cost of oil imports.

Nor is it clear that the antitrust laws have played a significant role in deterring export activity. As Congressman McClory pointed out in his remarks when introducing H.R. 2326, a "comprehensive study of export disincentives published last year by the Department of Commerce and the Office of the Special Trade Representative expressly did not include the antitrust laws among the major export trade disincentives, and no specific instances of those laws unduly restricting exports were shown." [1]

In fact, the major reason given in support of enacting legislation of the type before you today is that there is a perception that uncertainties under the U.S. antitrust laws inhibit the formation of export trading companies, overseas joint venturing, and the aggressive and efficient marketing of U.S. exports. But as I have just noted, there are no widespread indications that these laws have had the legal or practical effect of actually inhibiting export activities. Indeed, despite the long history of the U.S. antitrust laws, there is very little precedent to point to that would support the view that there is reason for undue concern when two or more competitors wish to get together to target their conduct on a foreign market rather than on competition within the United States.

For these reasons, I urge caution in considering whether to pass H.R. 2326 or H.R. 1648 at this very moment. Indeed, I believe that the wisest course of action would be for Congress promptly to enact H.R. 2459, the legislation which would establish a commission to study the international application of the U.S. antitrust laws. That commission would, under the mandate of the bill now pending, study the whole range of antitrust issues relating to foreign commerce, including the "application of the United States antitrust laws in foreign commerce, and their effect on," inter alia, "the ability of United States enterprises to compete effectively abroad." [2] This is precisely the issue that both H.R. 2326 and H.R. 1648 attempt to address. As Congressman McClory remarked when introducing H.R. 2459, it is expected that "the Commission will deal forthrightly with the issues before it and will provide Congress and the administration with the informed policy guidance and useful legislative recommendations which I believe characterize the report of the recent National Commission for the Review of Antitrust Laws and Procedures." [3] I agree with the

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[1] Congressman Robert McClory, Congressional Record, daily ed., March 4, 1981, at H779.

[2] Section 3(b)(1)(A) of H.R. 2459.

[3] Congressman Robert McClory, Congressional Record, daily ed., March 11, 1981, at H872.

Congressman and believe Congress should await that guidance so as to ensure that only necessary changes to our law will be made, and made in the most meaningful and effective mannner possible.

Assuming, nevertheless, that Congress deems it necessary and appropriate to enact export promotion legislation now, and recognizing that the Senate is moving very quickly on legislation similar to H.R. 1648 (S. 144), I would like to comment specifically on the proposals before you.

At the outset, let me note that when I testified three weeks ago on the Senate counterpart to H.R. 1648, S. 144, I did not have the benefit of considering specifically the alternative solution now reflected in H.R. 2326, which was introduced subsequent to my testimony. Accordingly, although my testimony then suggested that a solution roughly paralleling that contained in H.R. 2326 would be preferable to the exemption/regulatory approach of S. 144, I can now safely say that I favor the approach contained in H.R. 2326. Let me explain why by focusing, first, on what I believe to be the deficiencies in H.R. 1648 and, then, by briefly discussing H.R. 2326.

It is true that Title II of H.R. 1648 would not make any major substantive changes to existing antitrust law other than to extend to services the exemption now enjoyed by merchandise in the current Webb-Pomerene Act. (By the way, if H.R. 1648 is enacted, I can see no reason, either from an economic or a legal standpoint, to restrict the exemption to the export of goods alone.) Beyond that amendment, H.R. 1648 makes only procedural changes to existing law by establishing a regulatory mechanism for ostensibly ensuring greater certainty to organizations seeking to take advantage of the exemption.

But I have serious doubts that the solution to the perception of antitrust constraints on joint export activity is to establish a new regulatory system in a non-antitrust agency, the Commerce Department, and to employ a new bureaucracy to implement it. Recognizing the commendable objective of providing greater antitrust certainty to those who seek to act in concert concerning their export activities, there is a real question as to whether the regulatory approach contemplated by H.R. 1648 (and related bills) is really the best way to go about this.

To my knowledge, there has been no cost/benefit study undertaken to determine the efficacy of the contemplated certification procedure. The certification procedure, by the terms of the bill, will itself involve an inherent period of uncertainty and delay which could extend from 3-6 months and even inhibit those export opportunities that require prompt action. It, in effect, puts control of the uncertainty into the hands of the regulator, rather than the courts, albeit ostensibly for a shorter period of time. Moreover, the certification procedure could be complicated, expensive and burdensome and, I must note, seems to run counter to the new administration's basic desire for deregulation. Some might even claim that H.R. 1648 reflects another example of needless government regulation. Indeed, one can legitimately fear that the formidable burdens, expense and uncertainty involved in obtaining certification might actually act as a deterrent to joint export activity by those small and medium size companies the act is designed to assist.

Moreover, I cannot see how H.R. 1648 will do away with the need for sophisticated antitrust counselling, or will eliminate the possibility of complicated litigation by those who feel seriously aggrieved by supposedly exempt joint conduct, or by private parties and even by the government claiming that the joint activity is not really exempt, but ultra vires of the intended protection.

If, nevertheless, Congress deems it appropriate to pursue a regulatory approach to this subject, I urge that it be kept as simple as possible. The more complicated and expensive it is, the more likely it is going to deter the small and medium size firms the legislation is designed to assist from taking advantage of the law's provisions. Thus, I would suggest that consideration be given to defining certain categories or types of export trading companies or associations for whom certification would be virtually automatic, including those organizations whose applications demonstrate that there is no significant evidence of a direct, foreseeable and substantial adverse impact on U.S. domestic commerce or foreclosure of U.S. export competition. Similarly, it would seem helpful to identify the type of conduct which Congress deems, prima facie, to be beyond legal challenge. In this connection, the type of activity identified by Judge Wyzanski in *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 965 (D. Mass. 1950), would seem to be a good starting point. At the same time, it might be useful if Congress were to identify certain types of activity that would clearly not be countenanced by the Act.

Moreover, since the Act's purpose—to foster joint export activity be eliminating antitrust concern where appropriate—is plain and clear, but since the Justice Department and Federal Trade Commission are more sensitive to and familiar with the most important questions under Title II—the antitrust issues that will be raised by applications for an antitrust exemption under the Act—I urge that those antitrust agencies, not the Commerce Department, be made responsible for conducting whatever regulatory process is ultimately provided for by Congress. This would, at least to me, provide an opportunity to simplify there regulatory process, provide more responsive agencies to the real problems that are likely to arise under H.R. 1648, eliminate the need for consultations between Commerce and the antitrust agencies, and allow for more direct and prompt decisions with respect to pending applications.

In addition to the fact that the Justice Department and the FTC have the requisite expertise to review the antitrust implications of proposed joint conduct, the regulatory mechanism contained in H.R. 1648 creates the potential for conflicts between those agencies and the Commerce Department. Indeed, the bill specifically contemplates such conflicts and authorizes the Attorney General and the FTC to file suit to invalidate a certificate issued by the Department of Commerce. The possibility that the Justice Department or the FTC could challenge a certificate seems to me to significantly reduce the potential benefits from the regulatory process, and argues strongly in favor of giving the regulatory function in its entirety to those agencies.

In view of the difficulties I have outlined above with a H.R. 1648 regulatory/exemption approach, I believe that the approach reflected in H.R. 2326—one that involves clarifying the underlying antitrust laws themselves to make clear that they do not apply to persons or activities in U.S. export trade unless the conduct involved has a direct, substantial and foreseeable adverse effect on U.S. domestic commerce or export competition—is much more preferable. Utilizing such an approach would not only be simpler and obviate the need to incur the expenses involved in complying with complicated regulatory procedures, but should also ensure sufficient certainty concerning the scope of our antitrust law to foster the encouragement of export trade intended by H.R. 1648, especially by making it clear that the incipiency doctrine embodied in Section 7 of the Clayton Act will not apply in the case of export joint ventures (whether involving goods or services). Moreover, such an approach would be consistent with the Justice Department's current enforcement policy and the law in the area of international antitrust reflected by most judicial precedent.

I will not dwell on the sufficiency of the language of H.R. 2326, since I know others testifying today will have specific suggestions in this regard. Suffice it to say that I think the existing language basically does the intended job, although I think the concept of "foreseeability" might be added to specifically reflect the intent criteria mentioned by Judge Hand in *Alcoa*.[4] Moreover, if H.R. 2326 is to become law, I think it would be a mistake not to include parallel language amending the Federal Trade Commission Act so that the jurisdiction of both Justice and the FTC are identical in this area. I would also suggest that, if this legislation passes, it would be appropriate for Congress to repeal the Webb-Pomerene Act, which would then serve no purpose at all, at the same time. Furthermore, while I am not an expert in the banking area covered by Title I of H.R. 1648, it may well also be appropriate to add provisions to H.R. 2326 to ensure that banks, bank holding companies and international banking corporations can lawfully participate in joint export activities, if Congress believes that will improve our export prospects.

To sum up, I certainly commend the sponsors in the House for proposing legislation designed to improve the export trade of the United States. H.R. 1648 may, in the end, be an appropriate way to achieve that objective. To me, however, H.R. 2326 provides a better solution, a simpler, more direct, responsive and flexible approach. I would hope, however, that the questions raised by my comments and those of others will be carefully considered, and that before acting Congress will await the analysis and recommendations of the Commission contemplated by H.R. 2459, so that Congress can ensure that the United States develops a cohesive, comprehensive and efficacious policy for guaranteeing its international competitiveness in the remaining decades of this century.

Thank you for giving me the opportunity to testify today. I will be happy to respond to your questions.

Mr. RODINO. Mr. Goldsweig.

Mr. GOLDSWEIG. Thank you. I appreciate the opportunity to appear here today.

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[4] See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945).

I believe there is a need for clarification in the U.S. antitrust laws as to which kinds of foreign activities are reviewable by U.S. courts. There exists a perception in the U.S. business community that the extraterritorial application of the U.S. antitrust laws inhibits exports and other forms of international business activity.

Such a clarification also is necessary to diminish the impression in the U.S. business community that U.S. businesses competing abroad are subject to a double degree of antitrust scrutiny: first under local law and second under U.S. law, a factor not imposed on their foreign competitors.

I believe that an amendment to the Sherman Act such as H.R. 2326 will meet the need for a clarification in the law. It will send a message to the U.S. business community that the Government is encouraging exports and other U.S. business activity abroad. It will send a message to lawyers advising business clients contemplating overseas activity that their clients will be able to compete under the same legal rules as their foreign competitors. Finally, it will send a message to foreign governments that the United States is not seeking to impose its antitrust laws on firms and activities not involving U.S. trade or commerce.

The uncertainty that exists today regarding the extraterritorial reach of the U.S. antitrust laws primarily is the result of two standards, one for private actions and a different standard set forth as the current enforcement policy of the Justice Department in its Antitrust Guide for International Operations. The problems caused to the business community by divergent standards call out for a remedy like H.R. 2326.

Under the Antitrust Guide, the Sherman Act would not be applied to the foreign activities of U.S. firms which have no substantial direct or intended effect on U.S. consumers or export opportunities. More than a matter of enforcement policy, the Justice Department takes the position that

> To apply the Sherman Act to a combination of U.S. firms for foreign activities which have no direct or intended effect on U.S. consumers or export opportunities would, we believe, extend the act beyond the point Congress must have intended.

Cases involving private litigants have not resulted in the same antitrust coverage as interpreted by the Justice Department. For example, in a recent case from the Federal Court for the Southern District of New York, *Dominicus Americana Bohio* v. *Gulf & Western Industries Inc.*, the court declared that to achieve Federal jurisdiction it was "probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimus." *Dominicus Americana* is but one example of a number of cases that have applied U.S. antitrust laws where the primary impact of the business activity in question is on a foreign company in a foreign country.

Cases like these negate the positive influence of the Justice Department guidelines. Lawyers advising business clients about potential liability under U.S. law cannot ignore the standards applied in private actions. They are also aware that the guidelines are only the current enforcement policy of the Justice Department and are subject to change. The caution engendered by this uncertainty has in my opinion contributed to the belief shared by many U.S. business persons that the antitrust laws present an uncertain threat to their foreign business activities. A bill like H.R. 2326, as I see it, would bring the jurisdictional standard for all antitrust suits in line with the Justice Department's enforcement policies and help to alleviate this aspect of business uncertainty.

The time has come to establish a more precise limit on the extraterritorial reach of the U.S. antitrust laws. Such a clarification would be welcomed by many nations which believe the U.S. antitrust laws' extraterritorial enforcement may be contrary to their national interest.

For example, England, The Netherlands, Switzerland, Australia, South Africa, and the Canadian Provinces of Ontario and Quebec have enacted legislation blocking the reach of foreign antitrust laws. More pointedly, growing out of the *Uranium* litigation, in re *Uranium* litigation, Australia is considering legislation to provide for reprisals against U.S. firms if any Australian companies are subject to economic penalties in the United States.

In most cases, companies claiming injuries from competition restraints abroad have legal remedies in those foreign jurisdictions. Most major industrialized countries have competition laws. Japan has an antitrust law patterned after the Sherman Act. Not only do most of the European countries have competition laws, but also the Treaty of Rome, as administered by the Commission for the European Economic Community, provides a forum for transnational competition law issues in Europe.

Additionally, developing industrial countries such as Chile and Korea have adopted competition laws as those laws have become necessary. Each of these countries and jurisdictions has enacted and applied its competition laws in a manner consistent with its social and economic policies.

I believe that an amendment to the U.S. antitrust laws, such as H.R. 2326, would limit unnecessary and unwanted intrusions into matters that should properly be resolved in accordance with the local law and policies of foreign sovereigns.

I do not believe that H.R. 2326 would bring about any drastic changes in the enforcement of the U.S. antitrust laws. I base this statement on the fact that the language of this bill tracks closely the well-thought-out enforcement policy of the Justice Department as expressed in its Antitrust Guide for International Operations. That policy has been in effect for at least 4 years and I believe that the certainty it has provided has contributed positively toward encouraging more vigorous activity abroad. I have not heard anyone argue that the Justice Department's policy has had a deleterious impact on antitrust enforcement or shielded illegal business activity.

I would like to recommend three changes to H.R. 2326 that I believe are necessary to accomplish the objectives set forth by the sponsors of this bill. The first change is designed to take care of what Chairman Rodino identified as the so-called Pfizer problem. The second change is to set forth clearly the necessity of foreseeability as a jurisdictional requirement. The third change would be to provide a similar amendment to the Federal Trade Commission Act that would track the language in H.R. 2326 amending the Sherman Act.

These three changes are discussed in my statement, and in the interest of saving time I won't review them in detail now. Of course, I would be happy to answer questions about them.

In conclusion I would like to say that I support the concept of H.R. 2326. I believe that uncertainty surrounding the reach of the antitrust laws is a real matter of concern for U.S. firms considering or engaged in business ventures abroad. A bill like H.R. 2326 is a positive step toward lessening those concerns.

I agree with the sponsors of this bill, however, that it is unrealistic to expect that an amendment to the antitrust laws is going to result in an immediate and dramatic increase in U.S. commercial activity abroad. Successful competition by U.S. firms in world markets will only result from efficient production of superior products that consumers want. H.R. 2326, however, will send U.S. business the message that they can structure their activities to be competitive and still minimize antitrust risk. American business can get on with the business at hand—world business.

Thank you for giving me this opportunity to express my views.

Mr. RODINO. Thank you, Mr. Goldsweig.

[The complete statement follows.]

STATEMENT OF DAVID N. GOLDSWEIG

I. INTRODUCTION

My name is David N. Goldsweig and I am the attorney in charge of legal matters involving foreign antitrust laws and the extraterritorial application of the U.S. antitrust laws for General Motors Corporation. I have been actively engaged in the practice of antitrust and international competition law since I received my master of laws degree from the University of Chicago in 1967.

I have held my present position for the past four years. Prior to that time I was the senior trial counsel in the Foreign Commerce Section of the Antitrust Division of the Department of Justice. Before that, I was in private practice in New York and also received a Diploma in European Economic Community law from the University of Amsterdam. Currently, I am the Chairman of the Foreign Antitrust Laws Subcommittee of the American Bar Association Antitrust Section's International Trade Committee, and a member of the American Bar Association International Law Section's Task Force on the extraterritorial application of U.S. law.

I emphasize at the outset, however, that I am not testifying on behalf of any of those organizations. I appreciate the opportunity to appear today in an individual capacity to express some personal ideas on H.R. 2326 based on my experience.

II. NEED FOR CLARIFICATION IN PRESENT LAW

I believe there is a need for clarification in the U.S. antitrust laws as to which kinds of foreign activities are reviewable by U.S. courts. There exists a perception in the U.S. business community that the extraterritorial application of the U.S. antitrust laws inhibits exports and other forms of international business activity.

Such a clarification also is necessary to diminish the impression in the U.S. business community that U.S. businesses competing abroad are subject to a double degree of antitrust scrutiny: first under local law and second under U.S. Law, a factor not imposed on their foreign competitors.

I believe that an amendment to the Sherman Act such as H.R. 2326 will meet the need for a clarification in the law. It will send a message to the U.S. business community that the government is encouraging exports and other U.S. business activity abroad. It will send a message to lawyer advising business clients contemplating overseas activity that their clients will be able to compete under the same legal rules as their foreign competitors. Finally, it will send a message to foreign governments that the U.S. is not seeking to impose its antitrust laws on firms and activities not involving U.S. trade or commerce.

III. UNCERTAINTY IN THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAW

The uncertainty that exists today regarding the extraterritorial reach of the U.S. antitrust laws primarily is the result of two standards, one for private actions and a different standard set forth as the current enforcement policy of the Justice Department in its Antitrust Guide for International Operations. The problems caused to the business community by divergent standards call out for a remedy like H.R. 2326.

Under the Antitrust Guide the Sherman Act would not be applied to the foreign activities of U.S. firms which have not substantial direct or intended effect on U.S. consumers or export opportunities. More than a matter of enforcement policy, the Justice Department takes the position that ". . . to apply the Sherman Act to a combination of United States firms for foreign activities which have no direct or intended effect on United States consumers or export opportunities would, we believe, extend the Act beyond the point Congress must have intended." Antitrust Guide for International Operations, at p. 7.

Cases involving private litigants have not resulted in the same antitrust coverage as interpreted by the Justice Department. For example, in a recent case from the Federal Court for the Southern District of New York, *Dominicus Americana Bohio* v. *Gulf & Western Industries Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y 1979), the court declared that to achieve federal jurisdiction it was "probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimus." Dominicus Americana is but one example of a number of cases that have applied U.S. antitrust laws where the primary impact of the business activity in question is on a foreign company in a foreign country. See *Todhunter-Mitchell & Co.*, v. *Anheuser-Busch, Inc.*, 375 F. Supp. 610, modified in part, 388 F. Supp. 586 (E.D. Pa. 1974); *Industria Siciliana Asfalti Bitumi* v. *Exxon Research and Engineering Co.*, 1977-1 Trade Cas. ¶61,256 (S.D.N.Y. 1977).

Cases like these negate the positive influence of the Justice Department Guidelines. Lawyers advising clients about potential liability under U.S. law cannot ignore the standards applied in private actions. They are also aware that the Guidelines are only the current enforcement policy of the Justice Department and are subject to change. The caution engendered by this uncertainty has in my opinion contributed to the belief shared by many U.S. business persons that the antitrust laws present an uncertain threat to their foreign business activities. A bill like H.R. 2326, as I see it, would bring the jurisdictional standard for all antitrust suits in line with the Justice Department's enforcement policies and help to alleviate this aspect of business uncertainty.

IV. UNCERTAINTY AS A RESULT OF THE STATUTORY LANGUAGE

Another source of the uncertainty surrounding the jurisdictional reach of the Sherman Act comes from the language of the Act itself. Although the Sherman Act declares that "[E]very . . . conspiracy in restraint of trade or commerce . . . with foreign nations, is hereby declared to be illegal," authors of the leading treatises agree that competition or effects felt within foreign markets simply was not a matter of congressional concern at the time of the passage of the Sherman Act. See Brewster, *Antitrust and American Business Abroad,* 1958; Fugate, *Foreign Commerce and the Antitrust Laws,* (2d. Ed. 1973) p. 7.

The mere fact that the Webb-Pomerene Act was passed in 1918 to legalize qualifying export cartels that register with the Federal Trade Commission highlights the fact that there was congressional uncertainty as to the reach of the Sherman Act.

Rather than remove uncertainty, the Webb Act has tended to create more. Many U.S. companies avoid registration for fear it will only serve to make them a target for Justice Department inquiries regarding their activities that "spill over" into the domestic area. A well known example of this is *United States* v. *Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950), where the Justice Department successfully challenged a joint venture by American manufacturers which owned factories abroad and from which they sold exclusively into foreign markets.

A big problem is that any joint activity by U.S. trading companies shipping goods overseas is going to have some effect on the domestic supply of those goods. There is no clear bright line delineating when the spillover has sufficient adverse effect on U.S. commerce.

This uncertainty has existed now for over 90 years. The best way to reduce the uncertainty surrounding the reach of the Sherman Act is not to create a patch-quilt of exemptions or create more regulatory bureaucracy, but to clarify the basic law as H.R. 2326 will do.

V. A LIMITATION ON THE EXTRATERRITORIAL REACH OF THE SHERMAN ACT WOULD BE WELCOMED ABROAD

The time has come to establish a more precise limit on the extraterritorial reach of the U.S. antitrust laws. Such a clarification would be welcomed by many nations which believe the U.S. antitrust laws' extraterritorial enforcement may be contrary to their national interest. For example, England, The Netherlands, Switzerland, Australia, South Africa, and the Canadian Provinces of Ontario and Quebec have enacted legislation blocking the reach of foreign antitrust laws. More pointedly, growing out of the *Uranium* litigation, *In Re Uranium Litigation*, 617 F. 2d 1248 (7th Cir. 1980), Australia is considering legislation to provide for reprisals against U.S. firms if any Australian companies are subject to economic penalties in the United States.

In most cases, companies claiming injuries from competition restraints abroad have legal remedies in those foreign jurisdictions. Most major industrialized countries have competition laws. Japan has an antitrust law patterned after the Sherman Act. Not only do most of the European Countries have competition laws, but also, the Treaty of Rome as administered by the Commission for the European Economic Community provides a forum for transnational competition law issues in Europe. Additionaly, developing industrial countries such as Chile and Korea have adopted competition laws as those laws have become necessary. Each of the countries and jurisdictions has enacted and applied its competition laws in a manner consistent with its social and economic policies.

I believe that an amendment to the U.S. antitrust laws, such as H.R. 2326, would limit unnecessary and unwanted intrusions into matters that should properly be resolved in accordance with the local law and policies of foreign sovereigns.

VI. ANALYIS AND IMPACT OF H.R. 2326

I do not believe that H.R. 2326 would bring about any drastic changes in the enforcement of the U.S. antitrust laws. I base this statement on the fact that the language of this Bill tracks closely the well thought out enforcement policy of the Justice Department as expressed in its Antitrust Guide for International Operations. That policy has been in effect for at least four years and I believe that the certainty it has provided has contributed positively toward encouraging more vigorous activity abroad. I have not heard anyone argue that the Justice Department's policy has had a deleterious impact on antitrust enforcement or shielded illegal business activity.

I would like to recommend three changes to H.R. 2326 that I believe are necessary to accomplish the objectives set forth by the sponsors of this Bill. The first change is designed to take care of what Chairman Rodino indentified as the so-called Pfizer problem. The second change is to set forth clearly the necessity of foreseeability as a jurisdictional requirement. The third change would be to provide a similar amendment to the Federal Trade Commission Act that would track the language in H.R. 2326 amending the Sherman Act.

These changes would be reflected in the statutory language as follows: That this Act may be cited as the "Foreign Trade Antitrust Improvements Act of 1981".

Sec. 2. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

"Sec. 7. This Act shall not apply to conduct involving trade or commerce with any foreign nation unless, *and only to the extent that,* such conduct has a direct, substantial *and foreseeable* effect on trade or commerce within the United States or has the *direct, substantial and foreseeable* effect of excluding a domestic person from trade or commerce with such foreign nation.".

Sec. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end thereof the following: "This section shall not apply to joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation.".

Sec. 4. The Federal Trade Commission Act (15 U.S.C. 45 et seq.) is amended by inserting after section 25 the following new section.

"Sec. 26. This Act should not apply to conduct involving trade or commerce with any foreign nation unless, and only to the extent that, such conduct has a direct, substantial and foreseeable effect on trade or commerce within the United States or has the direct, substantial and foreseeable effect of excluding a domestic person from trade or commerce with such foreign nation.". (New language italicized.) Each proposed change will be discussed in turn.

A. *The Pfizer problem.*—The sponsors of H.R. 2326 intend that foreign entities or sovereigns, as in *Pfizer, Inc.* v. *Government of India,* 434 U.S. 308 (1978), should not be able to sue American companies in U.S. courts for restraints of trade abroad unless the restraint on export trade has a direct and substantial effect on American commerce or competitors. This would mean that if a foreign entity or sovereign were to sue in U.S. courts the only damages or injury that may be considered for purposes of U.S. antitrust jurisdiction are those having domestic impact.

I recommend that the clause "and only to the extent that" be included in the added Section 7 of the Sherman Act to make it clear that effects occurring solely within foreign jurisdictions do not provide a basis for antitrust jurisdiction alone, or even when aggregated with alleged effects having domestic impact.

B. *Foreseeability.*—A significant source of business uncertainty when engaging in foreign commerce is the possibility that an unpredictable, remote or indirect impact on U.S. commerce, determined after the fact, could result in a firm being subjected to U.S. antitrust jurisdiction. The Justice Department in its Antitrust Guide takes the position that only "foreseeable" effects on U.S. commerce should result in U.S. antitrust jurisdiction. Accord, *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 444 (2d. Cir. 1945).

I am not sure whether the idea of foreseeability is included within the clause "direct and substantial." I assume that the sponsors intend that it be included. It has been my experience, however, that ambiguity is likely to cause the opposite result. Therefore, I recommend that the phrase "direct and substantial" in Section 7 of the Sherman Act as added by H.R. 2326 be changed to "direct, substantial and foreseeable."

C. *Federal Trade Commission Act.*—I think that it is also necessary to provide a similar amendment to the Federal Trade Commission Act that would track the language in H.R. 2326 amending the Sherman Act.

I realize that historically the FTC has not demonstrated much interest in the foreign activity of U.S. firms or activity of foreign firms that affects commerce in the United States. The FTC's challenge to the joint venture between Brunswick Corporation and Yamaha Motor Company reveals that this is no longer true. *In Re Brunswick Corporation,* Docket No. 9028 (Decision of Administrative Law Judge Timony, March 14, 1980).

VII. CONCLUSION

In conclusion, I would like to say that I support the concept of H.R. 2326. I believe that uncertainty surrounding the reach of the antitrust laws is a real matter of concern for U.S. firms considering or engaged in business ventures abroad. A Bill like H.R. 2326 is a positive step towards lessening those concerns.

I agree with the sponsors of this bill, however, that it is unrealistic to expect that an amendment to the antitrust laws is going to result in an immediate and dramatic increase in U.S. commercial activity abroad. Successful competition by U.S. firms in world markets will only result from efficient production of superior products that consumers want. H.R. 2326, however, will send U.S. business the message that they can structure their activities to be competitive and still minimize antitrust risk. American business can get on with the business at hand—world business.

Thank you for giving me this opportunity to express my views.

Mr. Rodino. Professor Rahl.

Mr. Rahl. Thank you, Mr. Chairman and members of the committee.

I am happy to be here and I appreciate your invitation to testify, but I must say that I am rather anxious about what I am hearing and the direction in which Congress appears to be going.

I fear that a very real problem that we have with our trade balance is being addressed in ways that are not likely to succeed and which complicate it very much and may do considerable harm.

I filed a very detailed statement with you, and I won't undertake to cover most of the points there. I would like here to offer a little perspective to explain what I have just said.

First, I was quite surprised to hear the Secretary talk about the United States being an amateur in export trade. If we are an amateur, then who is the professional? We are the largest exporter among all the nations of the world, and we have a considerable lead over the rest of them, West Germany being our biggest competitor, not Japan.

It is true that we have declined somewhat in our percentage share of world exports, but there are a variety of reasons for that—hardly amateurishness.

General Electric, Boeing, Caterpillar, and a very impressive list of other U.S. companies, I think some 50 in number, each with export sales of nearly a quarter of a billion dollars a year and upward, are hardly amateurs. And they are the people who now keep us in the lead and I think are going to in the future.

I have no lack of sympathy for the problems of small business. They are great and manifold, and they should be helped wherever that can be done and when it can be done appropriately. But all the help you give them with legislation like this is not likely to make a whole lot of difference as far as our country's export performance is concerned. I don't think we are talking about the real problem there.

Second, I think that the danger is present here that our antitrust laws will suffer more serious consequences as a result of legislation like this than seems to be generally recognized by members of the committee. There were some very perceptive questions about that, however, during the discussion this morning, and by other witnesses here, and everyone shares, I'm sure, my interest in our preserving a good antitrust policy.

But I think there are great dangers in what is being proposed. What we fail to recognize, I believe—and I never hear it discussed—is the contribution made by antitrust policy to our foreign trade, and specifically to our exports. All of the discussion is about what harm it may be doing, harm that is not specified; it is not identified. I haven't heard one specific bill of particulars this morning about what specifically goes wrong under antitrust policy. But broadly speaking, we don't talk about what good it does, and I'd like to ask you to think about that for a moment.

We have in the foreign commerce clause of the Sherman Act, as well as in the rest of the Sherman Act, provisions which have opened the channels of commerce for American companies abroad, since World War II in particular, in an enormous fashion by breaking up world cartels in which American firms had unfortunately been participating in substantial numbers prior to World War II. I have done a lot of study of this. From 30 to 50 percent of world trade before World War II in the 1930's was moving under control of cartels, and there were many American participants.

The Justice Department launched a campaign after World War II, stimulated by Congress, which, by taking American firms out of these cartels, largely destroyed their effectiveness. It could not have done that as well if you had legislation of this kind. In particular, H.R. 2326 repeals—really repeals—the foreign commerce clause of the Sherman Act. You might as well just strike that clause. I think that, in effect, is what you are doing. And if I had time I could demonstrate that.

Now, that does not mean that you could not use the Sherman Act against an international cartel. If you show, under the bill and under present law, that there is an impact on interstate commerce, then you can attack it. But you will weaken the ability of the Justice Department to work on that.

Now, my point is that the result of largely destroying the world cartels that dominated foreign trade prior to World War II was to open the channels for American exports which had theretofore been substantially closed as a result of the market division agreements that world cartels characteristically enter into.

"You sell in Europe; we'll keep the American market"—this is the kind of agreement that you had. And the result was that we did not export to foreign countries nearly as much as these companies are now free to do.

If either of these bills is passed, although they work in different ways, I fear very much that participation in world cartels will be stimulated. It may be authorized by the Secretary, or allowed under the other bill, and I think that this will remove benefits that antitrust has been having for our foreign trade and probably do a good deal more harm than good.

Thank you, Mr. Chairman.

[The complete statement follows.]

STATEMENT OF JAMES A RAHL* ON INTERNATIONAL APPLICATION OF U.S. ANTITRUST LAWS

At the invitation of Chairman Rodino I am testifying concerning application of American antitrust laws to our foreign trade, and concerning the bills being considered by you. I appear in my capacity as a law professor and practitioner in the field, and not representing anyone. A major part of my work as a student of antitrust law and as an antitrust lawyer has been focused for the past 20 years on international and foreign antitrust policy, and I have devoted much time to the question of the impact of American antitrust on business abroad.

From that background, I have observed with increasing concern the rising popularity of demands for relaxation of antitrust policies in foreign commerce. This is not the first time that such a movement has occurred. Although one of the express goals when the Sherman Act was passed in 1890 was to combat the trusts and cartels which, as Senator Sherman put it, were "imported from abroad," [1] faith in antitrust periodically wanes.

IS THERE A NEED FOR EXEMPTIONS

After World War I, Congress was induced to pass the Webb-Pomerene Act to provide an exemption for export trade associations. The argument for this was that the still young nation might increase its trade and combat powerful foreign cartels abroad by using cartel methods, especially where small businesses were concerned.

The Webb-Pomerene experiment in retrogression from the competition philosophy of the Sherman Act has been tried for over 60 years, and has been a failure for most of the time. At present, only about 1.5 percent of our exports are "assisted" by Webb-Pomerene associations.[2] Worse, the example set has been used as an excuse by other nations less devoted to free market principles than the United States to continue their own export cartels which sell to us at cartel prices.

Meanwhile, exports have increased with little help from Webb-Pomerene to the point where the United States is the world's biggest exporter, with 14 percent of the free world's exports in 1979, compared with 11.5 percent for West Germany, 6.9 percent each for Japan and France, and 6.1 percent for the United Kingdom.[3] For a

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[1] 21 Cong. Rec. 2460, 51st Cong. 1st sess., March 21, 1890.

[2] Federal Trade Commission Staff Analysis, Webb-Pomerene Associations: Ten Years Later, 15 (Nov. 1978).

[3] "Study of U.S. Competitiveness," study of export trade policy as mandated in section 1110 of the Trade Agreements Act of 1979, (1110b) conditions of competition study, submitted to the Economic Trade Policy Staff Committee, July 15, 1980, table III-4.

time in the 1950's and 1960's, complaints about antitrust injury to American business abroad were revived as antitrust enforcement against international cartels was stepped up. But these complaints were swept under by a tide of American business success overseas, combining increased exports with a great wave of "direct investment" abroad in plants and facilities. This reached phenomenal proportions in the 1960's and 1970's, leading to popular books entitled such things as "The American Challenge" and "The American Takeover of Britain." [4]

Thus treated by the United States to a strong lesson in competition principles, European nations enacted their own antitrust laws, and with encouragement from us the Common Market moved to build competition policies rivaling ours in scope, with gradually increasing enforcement tempo. (None abandoned their export carterls, however often citing the Webb-Pomerene example as an excuse, without noting also its dismal record.) Ultimately, beginning eight years ago in 1973, spurred by an increasingly vocal and large group of developing nations, the United Nations sponsored discussions seeking international rules and principles against restrictive practices in world trade. With the United States actively participating, and with remarkable cooperation among developed, developing and Communist nations, a set of such principles were agreed to. They are cast along antitrust lines familiar to us—indeed mostly developed in our own statute and case law. They were endorsed by resolution of the General Assembly in December 1980.[5]

But in two of the bills before you today, H.R. 2326 and H.R. 1648, you are considering legislation which would fly directly in the face of these principles. Although the principles are "non-binding" in the sense that they are not enforcible law as to either nations or individuals, they are principles to which this nation has just agreed. If Congress and the Administration go in the opposite direction now it would be anomalous, to say the least.

What has happened, and what is the case for this desire to repeat a mistake of 60 years ago, compromise again our principles of competition, and abrogate our own agreement within the United Nations? The argument seems to be only the same one made in 1918—that we need to repeal or avoid the antitrust laws in our foreign, or export, commerce in order to remove obstacles or discincentives to exports. Little evidence exists that this is either necessary or desirable. And there is reason to believe that it would be counter-productive and harmful to our foreign trade and our domestic economy, as well as to our reputation.

Two principal arguments for such legislation are made: (1) that American "competitiveness" abroad has seriously declined, and (2) that our antitrust laws impede needed improvement in export performance. Neither proposition is self-evident and the facts in my opinion are to the contrary. While it may be true that the American percentage share of total world exports has declined in recent years, as stated in section 202(a)(3) of H.R. 1648;[6] this is due to many factors. In absolute terms, and also relative to our domestic economy, our export performance has been excellent. The volume of our exports has steadily increased, as has the percentage of the GNP accounted for by exports. A detailed analysis by Assistant Treasury Secretary C. Fred Bergsten last July found "growing international competitiveness of the U.S. economy." [7] A litany of news stories based on recent data have been telling us for months, in the words of the N.Y. Times, of "The Rise of American Exports" (Jan. 25, 1981); of "The Myth of Declining American Trade" (Dec. 11, 1980); of the lowest trade deficit since 1976 (Sept. 27, 1980); and now of trade surpluses for 1980 (March 20, 1981).

The fact is that our export performance is significantly outperforming the economy as a whole, and is one of the few bright aspects of the picture. The problems of competitiveness lie in our economic difficulties at home, not abroad, and that is where the solutions must be found.

DOES ANTITRUST IMPEDE EXPORTS

Although the nation's export performance is actually quite good, it may be thought that present antitrust rules prevent its being significantly better. I doubt very much that antitrust really acts as a substantial barrier in very many export situations, though it may be in a few, and as I point out below, antitrust encourages

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[4] By J. J. Servan-Schreiber (1968) and J. McMillan & B. Harris (1968) respectively.

[5] United Nations Conference on Restrictive Business Practices, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, TD/RBP/Conf/10 (U.N. 1980) sec. D, par. 3 and 4.

[6] See "Study of U.S. Competitiveness," supra note 3, table III-4.

[7] Remarks by Hon. C. Fred Bergsten before National Foreign Trade Council, New York, July 9, 1980 (mineo. Dep't Treas. News).

export competition and is a major factor in preventing serious reductions in exports. This is my overall judgment, and I am confident of that judgment. But the subject is complex and calls for a great deal of study and analysis. Obviously, many people are unconvinced. For this reason, as well as because there are a number of other important questions of law and policy concerning international antitrust, I favor passage of H.R. 2459 to provide for a commission to study these questions and to make recommendations for future action.

Pending such a study, I would like to point out some considerations which should, I believe, at least cause Congress to refrain from taking exemptive action until the problem is thoroughly studied. First, after many years of complaints about antitrust, there is still little specificity as to what the problems are, and even less proof that the problems identified actually prevent export sales. Perhaps for this reason, the emphasis lately has tended to shift from identifiable specific problems to statements that the antitrust deterrent consists of a "perception," and a feeling of too much "uncertainty."

I do not doubt that these thoughts are genuine, but they do not differentiate antitrust in foreign commerce from antitrust in general, nor from legal problems in general. Business itself is uncertain, legal risks are seldom fully covered, and of course business abroad has its own risks and uncertainties. Moreover, there indeed are antitrust rules which must be observed, and which do impinge upon freedom to do as one please in foreign trade. These typical aspects of economic life take on greater apparent force when put in a foreign setting, especially when foreign competitors are perceived to play by different rules, as they often undoubtedly do. There is no time to go into detail, but I believe, from considerable experience, that American antitrust involves far less restriction of American business in foreign commerce than in domestic commerce, and that there are few activities which will increase exports which cannot safely be done insofar as American law is concerned.

Two of the activities most often mentioned as raising problems are joint ventures for export purpose, and joint selling agencies. Joint venture companies formed by competitors do give rise to antitrust questions, and the same kind of problem could arise in connection with formation of an export trading company, if formed by competitiors. Where non-competitors are involved, however, formation raises no major problem. Where the operation of the company is confined to exports, it is unlikely that Section 7 of the Clayton Act would apply, even if competitors are involved, because of the requirement of proof of anti-competitive effect in a section of the United States. But the Sherman Act certainly can apply. The Department of Justice Antitrust Guide for International Operations takes the position that if the only effects are in foreign markets, however, the Sherman Act should not apply, and the Department has recently given clearance to a large consortium of American firms for a foreign hydraulic engineering project.[8] I believe they were correct in ruling that there would be no violation in that instance, because there would be no unreasonable effect on competition, although subject matter jurisdiction may be present.

The Justice Department, to my knowledge, has never attacked a consortium or joint venture formed for exports or to do business abroad. Careful legal advice can identify those ventures in which antitrust risks are unacceptable, and those in which they are as minimal as those accepted in normal transactions at home. With that, some joint ventures might not pass the test, but many would. Where genuine uncertainty exists, one can ask the Department of Justice for a business review. While in the past, these reviews have sometimes been slow, complex and costly, so that lawyers frequently advise against it, the Department some time ago adopted an expedited procedure for foreign trade activities.[9] I understand, however, that in over a year only one proposal has been submitted under the new procedure. Until this is given a better test than that, the uncertainty argument lacks considerable force.

As for joint selling agencies, the question is similar to that of joint ventures, but in some respects even more difficult. Such arrangements usually involve agreements among other wise independent sellers, and where the agent can set the price, or allocate territory or customers among the sellers, problems of possible per se violation of the Sherman Act arise. As a lawyer, I would certainly not minimize the antitrust risk in this instance. There do not appear to be doctrinal developments in case law occurring which may result in greater use of reasonableness tests as to some of these arrangements in the future. The *Appalachian Coals* case is still alive.[10] More-

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[8] Department of Justice, Antitrust Guide for International Operations, Case C., n. 39 at 21 (Jan. 26, 1977).

[9] CCH Trade Reg. Rep. par. 8559.40 (announced Dec. 6, 1978).

[10] *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933), upholding joint selling agency found to lack power to control the market.

over, the recent Supreme Court decision, and later decision by the Court of Appeals on remand in the CBS cases against ASCAP and BMI,[11] may support outright legality of joint selling arrangements where member-sellers are free to sell outside the agency on terms of their own choice. If I were asked for advice today on an export selling agency among competitors, subject to further facts, I would be inclined to call it an acceptable legal risk if it met the latter conditions. If it did not, I would advise against it, subject to the possibility of a Webb-Pomerene exemption.

THE CONTRIBUTION OF ANTITRUST TO EXPORT PERFORMANCE

The question of whether antitrust impedes exports is always put in terms of individualized situations. But this is not the only relevant question. One must also ask whether antitrust laws do not benefit our foreign trade far more than they interfere with it. When this question is asked as to domestic law, the answer has generally been that the competition protected by antitrust benefits commerce by stimulating it and by preventing the restrictions on production and the higher prices associated with monopoly. The same question should be put for foreign commerce. The question is not, as sometimes stated, whether we want to use antitrust to benefit foreign buyers in foreign markets. This fails to focus on the real policy of antitrust which is not to protect businesses or customers as such, but to stimulate trade by providing a free and dynamic climate and by preventing monopoly and restrictive practices.

The main impact of American antitrust law on foreign trade, including exports, has been decidedly beneficial to that trade. This is most evident in the events beginning with and following World War II. I have recently made a substantial study of international cartels, largely rediscovering something that was once well-understood but which we are now in danger of overlooking.[12] In a major assault on international cartels which governed trade to and from the United States, involving about 60 cases between 1940 and 1950, the Justice Department largely destroyed the leading world cartels, and made them sufficiently hazardous that similar cartels appear only rarely now. This effect came about for two reasons: (1) when American firms left these cartels and began to compete abroad, the cartels were rendered largely ineffective as a practical matter since they could no longer control competition in their markets; and (2) foreign firms, despite complaints that we were applying our laws extraterritorially, were forced to abandon cartel activity in the U.S. domestic market and in our imports.

The result had to be a dramatically beneficial effect on our trade, and, as a by-product, on world trade generally. This is because almost all international cartels follow a pattern of dividing world markets among themselves. Such divisions customarily not only excluded foreign competitors from the U.S. market, but as a quid pro quo kept American firms out of designated foreign markets, thus directly excluding or limiting U.S. exports. The dimensions of this must have been enormous, though largely lost to view because of the general upheaval caused by World War II. The dimensions are indicated by several serious studies that show that upwards of half of world trade, between 1929 and the start of the war, was controlled or "influenced" by international cartels. Some of these cartels not only seriously restricted American trade, but by virtue of agreements dividing fields and restricting technology evidently seriously retarded American war-preparedness in such vital materials as synthetic rubber for tires.

Removal of most of these cartels undoubtedly contributed greatly to the surge in American exports and direct foreign investment which followed the war. There is no basis for thinking that antitrust laws are no longer needed to continue to provide such important protection. The mere fact that all nations, including our own, continue to cling to some form of legalization of export cartels shows that the tendencies have not disappeared. Antitrust enforcement experience in the United States, the Common Market and many other individual nations continues to show interest in cartels which may need only the encouragement of a major power like the United States to risk another round of such damaging activity as preceded World War II. The fact that foreign governments today occasionally form or defend cartels in particular fields, from OPEC oil to uranium, shows that the impulse to cartelize is not gone. The very resistance of other governments to the extraterritor-

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[11] *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), on remand, 620 F. 2d 930 (2d Cir. 1980), cert. denied, March 2, 1981.

[12] J. A. Rahl, International Cartels and Their Regulation (Paper presented at Conference on International Restrictive Business Practices, Nov. 9, 1979, sponsored by Columbia University Center for Law and Economic Studies, at Airlie House, Va.; to be published by Columbia University Press, Fall 1981).

ial application of American and EEC antitrust is probably in part influenced by similar motivations.

In this world context and in light of this history, passage of legislation to authorize American combinations of competitors to restrain competition in world trade, with the risk that these combinations will form linkage with foreign competitors and start the whole dismal cycle again, is a dangerous game to play with our exports, our trade, our domestic economy and our general welfare.

COMMENTS ON BILLS

I have already indicated above the opinion that neither of the antitrust exemption bills, H.R. 2326 and H.R. 1648, should be passed. I would favor H.R. 2459 to provide for a study commission.

The following are some specific comments on the bills without attempting a comprehensive analysis of each.

H.R. 2326

This bill, as an amendment to the Sherman and Clayton Acts, has the virtue of being a fairly simple, straightforward approach, in contrast to the highly complex and involved Export Trading Company bill. It is far more sweeping, however, in potential scope. It would raise most seriously the problems of increased cartel activity and long-run damage to trade discussed above. I believe it would be counter-productive to the goals sought by its sponsors, because it is likely in the long-run to restrict exports more than it aids them. It also contains some serious ambiguities. My reasons are as follows:

1. Section 2 really repeals the whole "foreign commerce" clause of the Sherman Act, saving only the final clause on "excluding a domestic person. . . ."
2. The section is so broad that it would permit agreements which restrict or even prohibit exports of particular goods and services, contrary to the goal of promoting exports.
3. Section 2 also is so broad that it would exempt restraints of trade applied to imports, as well as to exports, and there seems to be no argument in favor to doing that. While the Wilson Tariff Act prohibition of import restrictions is not directly repealed, it is a weaker law than the Sherman Act, and it is almost repealed by implication because of its great inconsistency with this exemption.
4. The saving clause for conduct having a "direct and substantial" effect on trade within the United States does little more than existing law, i.e., a restraint on foreign trade causing an effect on interstate commerce is covered now. A possible exception is that the new phrase would apply even if the effect were limited to one state. On the other hand, the new phrase is narrower than existing law in the sense that present law reaches restraints which either: (1) substantially affect interstate commerce, or (2) occur "in the course of" such commerce regardless of effect. Substantial effect need not also be "direct" under present law.
5. The phrase on "excluding a domestic person" is not traditional antitrust doctrine, and might be interpreted to prohibit simple exclusive dealing or individual refusal to deal activities which would not violate the present Sherman Act. Also, "domestic" person is ambiguous.
6. Perhaps most unfortunate of all is the risk that this provision would encourage American firms not only to form cartels among themselves, but to participate in foreign and international cartels. An agreement between American and foreign firms dividing markets throughout the world except for the U.S. market would be exempt under this provision. Past experience indicates that a serious risk would then arise of a secret agreement to include the United States in the market allocation to round things out.
7. Section 3, amending Section 7 of the Clayton Act to permit export joint ventures, would have a clarifying effect, but is probably unnecessary because Section 7 would not be likely to apply anyway. The Sherman Act will not apply either if Section 2 of the Act is adopted.

H.R. 1648

Title I permitting banks to invest in export trading companies may be a very good idea, and I offer no criticism of this idea.

Title II amends the Webb-Pomerene Act to provide antitrust exemption for both trading companies and export associations, to include "services" as well as "goods" within the exemption, and to provide an entirely new procedure for granting and removing the exemption.

As long as we have a Webb-Pomerene Act, it makes no sense to limit it to goods, and the addition of services is a reasonable step. Also, although I see not very much need for an antitrust exemption for formation of trading companies to the entities which can obtain a Webb-Pomerene exemption. It is not entirely clear to me that they would not come within existing provisions, but I have not studied that question.

The revised criteria and conditions under Section 204 to be applied to determine eligibility for an exemption appear to include those now found in the Webb-Pomerene Act together with some useful additions. I have no specific comment about these, except to note that they appear to be as strict as those found under existing law. It is that strictness which has often been asserted as a main reason why firms do not apply for Webb-Pomerene exemption now. Accordingly, I wonder what the new law adds and whether it will not be every bit as ineffectual as the old law.

The answer to that question, if there is an anwer, must lie in the new procedure. This provides for a certificate granted by the Secretary of Commerce under Section 206 after a determination by him that the applicant meets the criteria of Section 204, and shows a "specified need" to engage in exempt activities to promote export trade. The certifcate lists the activities which may be engaged in, and presumably thereby limits what the exempt firm or association may do. A limited time is given for the Secretary to make his determination, and it is predictable that if he has very many applications, he will either be bogged down by this procedure, or will end up administering it superficially. He must consult with the Attorney General and Federal Trade Commission, hoping that they will agree to let one or the other handle the matter. If they object to a certificate, a short delay occurs within which they can seek an injunction in a de novo court trial involving whether the criteria of Section 204 are being met. After the certificate takes effect, either agency may also bring an action to revoke it on the same basis. Private persons may not bring such an action.

During the time a certificate is in effect, the association or company is exempt for activities and methods specified in the certificate carried out in conformity with such provisions, terms and conditions as the Secretary has prescribed in the certificate, and cannot be made liable later for such activities and methods in the event of revocation or invalidation of the certificate. Thus, it appears that the terms of the certification give absolute protection. Even if a court should later hold that the Secretary has allowed the company or association to do something which goes beyond or violates the Act, there can be no liability for conduct during that period.

I would be opposed to this certification procedure. Not only is it extraordinarily cumbersome and complex, but it delegates to the Secretary of Commerce great power to abrogate the antitrust laws insofar as exports are concerned. It seems to me unwise to lodge such power in an authority having no other responsibility for maintaining a coherent antitrust policy and lacking experience and expertise in this area.

Although the antitrust enforcement agencies may object, and may also seek an injunction, they would be placed in the position of launching a court attack on a decision of the head of a coordinate executive branch, and would either be reluctant to do so, or would thereby present a rather awkward spectacle. The effort thereby to guard the public interest may be laudable in spirit, but the mechanics seem extremely clumsy, if not unworkable.

Most important of all, I do not see any safeguard against the Secretary's allowing the applicant for a certificate to enter into international cartel or other arrangements, in the name of promoting exports. This portends the same long-run dangers that I have discussed above.

H.R. 2459

I support passage of this bill, which provides for a commission composed of persons from Congress, the Executive Branch, and the private sector to study the problems of international application of U.S. antitrust laws. It is clear to me that such a study should be made before any exemption or similar legislation is adopted, and this bill should be protected by a moratorium on other bills in this area.

In October 1979, I testified in favor of the similar bill, S. 1010, sponsored by Senators Javits and Mathias, in hearings before the Senate Committee on Governmental Affairs (96th Cong., 1st Sess., pp. 92-106). I have also written a detailed article on issues and proposals which may be considered by such a commission.[13]

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[13] J. A. Rahl, International Application of American Antitrust Laws: Issues and Proposals, to be published in 1981 in vol. 2, No. 2 of Northwestern Journal of International Law and Business.

I have two concerns about the work of the commission. The first is that it not begin with an a prior presumption that given exemptions or other changes are to be made. It should be as open and objective as humanly possible, and its membership should be chosen with that goal in mind. Second, the bill requires that the commission complete its work and report within one year. This appears to me too short a time in which to complete some of the studies which should be made, and I would suggest that the bill be revised to permit an interim report within one year, and a further report within a later stated period, if considered necessary.

Mr. RAILSBACK. Mr. Chairman.

Mr. RODINO. The gentleman from Illinois.

Mr. RAILSBACK. I am not going to preempt anybody's time except to say I am delighted to see my former law school professor from Northwestern Law School and formerly, I might add, the dean of the Northwestern Law School. I am very happy to have him here. And I may not agree with his views in this particular instance—somebody is saying I'd better. But in any event, I thought he did an outstanding job. It is a treat for me to see him again.

Mr. RAHL. Thank you very much, Congressman Railsback. I appreciate that.

Mr. MCCLORY. Let me extend another warm welcome from another Illinois member to you, Professor Rahl, and say the student learned very well.

Mr. RAHL. Apparently, except on one point. [Laughter.]

Mr. RODINO. I want to thank each of you very much. And I would like to advise you that the committee members would hope to be able to send questions through the staff to each of you if there are questions they'd like to submit. And we would hope that you would have the time and inclination to reply to them in writing, those questions that we may not get to this afternoon.

Is that all right with the panel?

[Affirmative response.]

Mr. RODINO. Professor Fox, Professor Rahl indicated he feels that the language of H.R. 2326—and I believe that I correctly understood this—might generate an atmosphere that would lead to the establishment of large international cartels. Do you have any opinion on that? Do you believe that that concern is one that should really give us some pause?

Ms. FOX. I do have an opinion on it. I certainly share Professor Rahl's concern that we should do nothing that would facilitate such worldwide cartels.

I also have some concern that the proposed language of 2326 could tilt toward allowing such a result because of the language, "unless such conduct has a direct and substantial effect on trade and commerce within the United States."

Language that cuts back U.S. antitrust to cases of "direct and substantial effect," could tie our hands in attacking U.S. companies' participation in foreign cartels that have a very substantial effect, but, arguably a somewhat less than direct effect on trade and commerce within the United States.

Language designed only to make it clear that the law does not protect foreign buyers, suppliers, competitors, or consumers injured by breakdown in foreign trade would not have the result of condoning of foreign cartels that hurt U.S. consumers.

Mr. RODINO. Mr. Victor.

Mr. VICTOR. Yes, sir. I can sympathize with the comments made both by Professor Rahl and Professor Fox. On the other hand, I am not so sure that I agree that the language proposed would necessarily have the impact that they are suggesting. The question would be: What is a direct, substantial, foreseeable effect on U.S. commerce or on export opportunities from the United States? And if there is some conduct abroad in which we could find American participation which would satisfy those criteria, then I am somewhat less inclined to think that this amendment would affect our ability to challenge that conduct.

I might add that these questions that are now being generated are difficult questions and require precise responses, and even then they probably won't be responses that everybody would agree with. And again that is why I think this is an important subject to await consideration by the study commission contemplated by H.R. 2459.

Mr. RODINO. Mr. Goldsweig.

Mr. GOLDSWEIG. Mr. Chairman, I would suggest that the language appearing in 2326 does not move the law away from the very adequate standards, the very adequate protection suggested by the Justice Department in their international guidelines.

I don't believe that there is any intent to move away from the standards of the international guidelines, and therefore I feel that since we have not yet seen the negative result under these guidelines suggested by Professor Rahl, we will not see it in the future.

Mr. RODINO. Do you want to add anything, Mr. Rahl?

Mr. RAHL. Please, Mr. Chairman; thank you.

I think it's been too short a time to know what the effect of the Department of Justice guide is, though I think in general it is very helpful and very good.

Let me explain a couple of points about what I said that the others have mentioned. In your bill, H.R. 2326, you say that the Sherman Act shall not apply to activities involving commerce with foreign nations.

That does two very broad things. One is that it says it shall not apply to restraint of competition in American exports. And it also says it shall not apply to restraint of competition in imports—it covers imports, and we haven't even talked about that. That is why I said it repeals the whole foreign commerce laws.

Now, you can bring either one within the Sherman Act if it has a direct and substantial effect on domestic commerce. But what this bill will clearly permit is an export cartel, for instance—not only one which seeks to improve exports but an export cartel which will reduce exports or even agree not to export. That is the first step toward building a world cartel.

The second step is also not reached by the bill. If that same group agreeing not to export either entirely or to a given country does so on a quid pro quo basis with a foreign company as to a third country—let's say a French and American group agree not to compete as to South America—you have something this bill will not reach even though it stops the flow of our exports to South America.

Now, what about to the American market? There the "direct and substantial" test will provide some protection. I don't deny that.

That is pretty much the way present law would work anyway if you would remove the foreign commerce clause.

But once you start this process, the next thing a world cartel does—and this is documented and it is easy to show—is that it has a strong temptation to include the American market in its agreement, and you start the whole dismal process all over again.

Mr. RODINO. Let me ask one further question, the same question for each of you.

Do any of you see that H.R. 1648, which Secretary Baldrige incidentally indicated in his testimony affords exporters maximum protection from treble damage suits, would protect the exporters in the way the Secretary sees it, and more so than H.R. 2326 would?

Ms. FOX. I don't think that the administration bill does give more protection than 2326. It only protects with respect to operations in export trade that are specified in the certificate and carried out in conformity with provisions, terms, and conditions described in the certificate.

It doesn't protect as to other restraints of trade.

Mr. RODINO. Mr. Victor.

Mr. VICTOR. Yes, sir. I think one thing that was mentioned by one of the Congressmen this morning was that the whole idea of conduct ultra vires, beyond that which is specifically protected by the certification, was really not addressed.

If you have a company that really feels aggrieved by the joint conduct of competitors with respect to business that it thinks it may have some opportunity to share in, and if it is willing to put up the money, it is like any other lawsuit or any other complaint to the Government. You will study it and you will proceed if you feel that there is a legitimate basis to proceed in demonstrating why the conduct is indeed not covered by that exemption.

Mr. RODINO. Thank you.

Mr. Goldsweig.

Mr. GOLDSWEIG. I don't favor the approach in 1648. What we would be continuing down the road with is a patchwork quilt of exemptions. It would be far better, I believe, to approach the basic problem which 1648 identifies as overzealous taking of jurisdiction, taking of too much jurisdiction by the courts, by private litigants. It is better to approach the legislation at issue, the basic antitrust laws, and make sure what the jurisdictional reach is. That is what we do in 2326.

Now, even if we were to accept the 1648 approach, I don't think it will work.

When I go to a barbershop and I see a certificate on the wall saying that the barber has a license to cut my hair, well, I think that the people who gave him that license probably were able to anticipate his needs. He represented to them that he knew how to cut hair, that he would run a clean shop, that he would follow local ordinances, et cetera, and they signed him up and gave him a certificate for his wall.

It is a far different matter to issue certificate in a complex area such as international trade. The genius of the success of international traders is the ability to seize opportunities quickly, to move fast, to change direction, even 180 degrees if necessary. This is what successful international traders do, what they must do.

I submit that if one expects certainty of protection under a law that protects only when the specifications of the notification are in fact the specifications of the actual business being done, the protection is illusory. I submit that no sooner than many international businesses will have set out what they intend to do, set it out in their request for certification, they may have to alter their plans to meet the changing opportunities offered in the marketplace. They might be sending, using a term bandied about earlier today, "high-priced Wall Street lawyers" every week over to the Commerce Department to amend the certificate, and even that might not be fast enough. H.R. 1648 will be unwieldy, it will be costly, and probably not workable.

Secretary Baldrige himself argued that such certification will make antitrust enforcement more efficient; it will put a lot of information together in one place for antitrust authorities as well as the Commerce Department to review.

I submit that for the same reason it will lend great efficiency to private litigation. A company with a potential grievance will have all of the information available in one place as to the intended activities of the potential defendant. The prelitigation research will be relatively simple: compare the description in the notification to what is actually being done. And there will be the germ of a case every time a discrepancy is found.

I'm afraid that this vain attempt for certainty might turn into an absolute nightmare with more litigation than ever. If activity is ultra vires to the notification, what protection will there be?

Thank you.

Mr. RODINO. Professor Rahl.

Mr. RAHL. I think if Secretary Baldrige wants to reduce the role of lawyers in this area, he is taking exactly the wrong approach. The bill is full of lawsuits; it is full of legal pitfalls every step of the way—more so, even, than the Robinson-Patman Act, by the time you are finished trying to administer that bill. I think it is a big, big mistake.

I would pass title I of the bill. I think it is probably a good idea, although I am not a banker. But title II——

Mr. RODINO. Thank you very much.

Mr. RAHL. I also haven't had a chance to say I am very much in favor of Congressman McClory's study commission bill. I think that is the way you really ought to proceed, find out what the problems are first, and then legislate.

Mr. RODINO. Thank you very much.

Mr. Goldsweig.

Mr. GOLDSWEIG. Mr. Chairman, may I anticipate an issue that I think is going to be discussed, and it has in fact been raised by Professor Rahl, and of course by Mr. Victor. That is the issue of formation of a study commission with respect to 2326 as opposed to passing 2326 now.

I would submit——

Mr. RODINO. Would you hold it, Mr. Goldsweig.

I will pass on to the members and ask them to ask questions and get those comments.

Mr. GOLDSWEIG. Thank you.

Mr. McCLORY. Thank you, Mr. Chairman. That was my first question, but I assume it just requires a yes or no answer. And I want to direct it to Professor Rahl and to you, Mr. Goldsweig, and Mr. Victor, too, I guess.

Even though the committee may report out H.R. 2326, do you feel that the study commission in H.R. 2459 would also be desirable?

Mr. RAHL. I think that the study bill is the right idea. If you pass 2326 also, then they will have to be studying whether 2326 was a good idea or not. I think it is better to study it before you pass it.

Mr. McCLORY. But then the study commission can review other aspects of the effect of our antitrust laws on foreign trade.

Mr. RAHL. Of course, by all means, and there are many, many problems that should be studied.

Mr. VICTOR. To comply with your request, I would answer that "yes."

Mr. McCLORY. Professor Fox, I was very much interested in your suggestion in the last of your testimony with regard to a change which might give greater assurance as far as review by the Antitrust Division is concerned.

One of the objections to Mr. Rodino's and my bill is that American companies are afraid to go to the Antitrust Division with their problems and request a review letter. The reason there is very little activity over there is because of this inherent fear of laying out the problem; they really don't get any assurances—they may not get a yes or no answer on the request. They will just say, "We don't care to express an opinion on that subject."

Do you think we could, in H.R. 2326, perhaps insert a provision whereby the Department of Justice must issue the review letter and perhaps give greater protection to what that letter reports?

Ms. FOX. It could be done in 2326. It is an issue, however, that raises many considerations.

It relates to a larger picture not confined to exports, for example, whether the treble damage remedy should be varied in other ways. I think it would involve some study.

Mr. McCLORY. You suggested an amendment, too, that might eliminate the treble damage problem, and as we heard in the testimony from Secretary Baldrige this morning, he said that in H.R. 2326 we run the risk of treble damages but not in the certification process that he preferred.

I am not in favor of the treble damage threat being held over the heads of American companies who are trying to compete in foreign markets, so we could cure that problem, couldn't we?

Ms. FOX. You could do that. I was simply suggesting there are a lot of pieces to the same problem that one might want to think out systematically.

It may be argued that the Justice Department would, if it had this power, be less likely to grant busines review letters. Although that is a possibility, a signal could be given to the Justice Department that it should take on difficult questions and simply make a decision one way or the other.

Mr. McCLORY. Mr. Goldsweig has offered some suggestions and amendments, and I would appreciate seeing any language that you feel would be appropriate.

Ms. FOX. I'd be glad to provide it.

Mr. MCCLORY. You are all prominent in bar association sections relating to trade and antitrust; you, Professor Fox, in the New York City Bar Association, and you, Mr. Victor, in the antitrust section of the American Bar Association. You both qualified your statements by saying that you are testifying as individuals and not as part of those sections.

Is it possible, though, that the sections will have this legislation before them for consideration and that there will be a section report or recommendation with regard to it?

Mr. VICTOR. I can say that the international trade committee of the ABA, of which I am chairman, is in fact looking at these various proposals now. It has no position at this point, and I am constrained to say that for that reason I am only speaking for myself, as would be Mr. Goldsweig and Professor Fox, who is also of the ABA antitrust section. So do not construe these remarks as being from the ABA, but it will be studied there, yes.

Mr. MCCLORY. So it is possible that the section will have a position later?

Mr. VICTOR. Yes, sir.

Mr. RAHL. One of the problems the section may have is I am a member of Mr. Victor's international committee. That might slow it down slightly.

Mr. MCCLORY. Well, we won't wait for it, but if it comes along it might be helpful.

May I ask one more question. I am concerned about this. Professor Rahl, I believe you present this view.

I don't feel that American companies should be subject to any restraint that overseas companies operating in foreign countries are not subjected to. So if they operate in cartels or share markets or whatever type of arrangment they choose, I don't see that we should be concerned about that. Presumably the American enterprise system will try to get the maximum amount of business and not deliberately hurt themselves. If they can only get part of the market, they will get part of the market.

What specifically concerns me with respect to the provision that we have in H.R. 2326 about the impact that these arrangements might have on the domestic market is that we might run into some practices that foreign countries or foreign companies adopt, which in turn could hurt an American company that gets into a joint venture or other arrangement with such a foreign company or cartel.

That is why I am going to be inclined to want to give complete protection, not only for activities overseas but for activities here.

Mr. RAHL. I shouldn't think you'd want to give exemption for an agreement that would restrict U.S. exports, and your bill would do that—I mean would allow it. It would allow American exporters to agree not to export to given countries.

I think perhaps what may be concerning you and concerns us all is the fact that our exporters meet different legal conditions when they go abroad. There is no question about that. In many countries cartels are permitted.

Mr. MCCLORY. Is it not true that under Webb-Pomerene at the present time those companies that are exempted under the Webb-Pomerene can select their markets and select the people they want to do business with and limit their exports and certainly limit competition overseas through these arrangements?

Mr. RAHL. That is true, of course, and were it not for the fact Webb-Pomerene has been so ineffectual, I'd be saying more in opposition to it than I've said.

Mr. MCCLORY. I can assure you there is a strong inclination to extend the application of Webb-Pomerene, not to restrict it.

Mr. RAHL. I am aware of that, Congressman. I just read through all the legislative history of the Webb-Pomerene Act, and what I hear now is very similar to what was being said then.

Mr. MCCLORY. My time is up, but Mr. Victor and Mr. Goldsweig and Professor Fox have something they want to add.

Mr. VICTOR. May I make one comment, Mr. Chairman?

Mr. RODINO. Without objection. We will try to move along. We have a 5-minute rule.

Mr. VICTOR. I'll move with alacrity.

Mr. RODINO. Go ahead.

Mr. VICTOR. I have a little trouble understanding Professor Rahl's concern, and I just feel I should put my view on the table.

The statute, if it is enacted, says that the Sherman Act would not apply to conduct involving trade or commerce with foreign nations unless the conduct has the effect of excluding a domestic person from trade or commerce with such foreign nation.

If two American companies were to agree not to export, I would think that would fall within that language, unless I am missing something.

Mr. RAHL. May I try to answer that?

Mr. RODINO. Go ahead, Professor.

Mr. RAHL. I see what Mr. Victor means. I have been reading that as meaning an agreement to exclude other exporters, in other words, to exclude a competitor, which is the way Webb-Pomerene now reads, and I had thought that was probably the intention of this language.

Mr. RODINO. Go ahead, Mr. Goldsweig.

Mr. GOLDSWEIG. I have a very brief comment with respect to Professor Rahl's remarks and Mr. Victor's remarks.

I don't share Professor Rahl's concern that there would be a growth of limitations on volume of export. The possibility is there. I don't deny the theoretical basis for Professor Rahl's comments.

But I would argue that it is also there in our present antitrust laws. I would point out that 2326 really will only fine-tune what we now have. The antitrust laws have worked quite well. The private standard and the standard set forth in the antitrust guidelines of the Department of Justice have become slightly out of sync. 2326 would line them up again, would just tilt them ever so slightly so there was one uniform standard, so that the few aberrational cases did not come to the fore and gain undue importance in the minds of the antitrust counselors. The undue importance in their minds leads to overly conservative advice to clients, which leads to some degree of inhibition.

So in summary there is such an ever-so-slight change contemplated by 2326 that I see no reason for Professor Rahl's concern, since we haven't seen any basis for his concern evidenced under our present laws.

Thank you.

Mr. RODINO. Mr. Seiberling.

Mr. SEIBERLING. Thank you. I have kept a box score here. As I add it up—and please correct me if anyone disagrees—none of you like the LaFalce bill, H.R. 1648, all of you like the McClory bill, H.R. 2459, and you have some differences of view on the Rodino bill, H.R. 2326. Is that correct?

Just to take up your point Mr. Goldsweig I don't really see the Rodino bill as being the same as the present Justice Department Antitrust Guide. If you will look at page 3 of your statement, you say that under the antitrust guide the Sherman Act would not be applied to the foreign activities of U.S. firms which have no substantial direct or intended effect on U.S. consumers or export opportunities.

But when I read section 7 of the Rodino bill it doesn't say that. It says:

> * * * unless such conduct has a direct and substantial effect on trade or commerce within the United States * * *

Don't you agree that that is a substantial difference?

Mr. GOLDSWEIG. Mr. Congressman, on page 3 of my statement I quote from the Justice Department guidelines, making the point that:

> More than a matter of enforcement policy, the Justice Department takes the position that "* * * to apply the Sherman Act to a combination of United States firms for foreign activities which have no direct or intended effect on United States consumers or export opportunities would, we believe, extend the Act beyond the point Congress must have intended."

While the language is not the same in section 7 of H.R. 2326, I believe that the intent is the same. I believe that the result would be the same.

Mr. SEIBERLING. Well, if so, then this section 7 has even more ambiguity than I thought it did. It says "within the United States," and that is not export trade, as I understand it.

Well, let me ask Professor Fox: What happens if a venture or cartel starts out small and does not then have any direct and substantial effect on trade accomplished within the United States, but at some point becomes very successful to the point where it has a substantial effect on U.S. imports or exports? Would it at that point lose the protection of the Rodino bill, in your opinion?

Ms. FOX. Yes; that is how I would read it, if it has a direct and substantial effect on imports.

Mr. SEIBERLING. Well, as I read the Rodino bill, then, it works as long as the matter is exclusively outside the United States, does not affect the foreign commerce of the United States, but once it has a substantial effect on U.S. foreign commerce, it would then no longer be protected by this bill.

Ms. FOX. I would like to comment on the difference between not coming within the immunity and being in violation of the law. It is extremely unlikely for a joint venture for export activities ever to offend the U.S. antitrust law. They could have a significant effect on imports, and yet it is very unlikely for there to be an anticompetitive effect in the United States.

The only possible exception would be the most highly concentrated market with the highest barriers to entry where you have, say, only two or three firms in the U.S. market. It may possibly be, in such rare instances, that there could be found to be a spillover effect, such that the export activities that are authorized spill over into anticompetitive behavior in the United States.

That has never been found in any case under the U.S. law. And I think it is not a serious worry in connection with export trade and the desire to promote export trade among small- and medium-sized firms.

Mr. SEIBERLING. Well, I still feel there is some ambiguity here, and I must say I am also troubled by a point Professor Rahl raised.

Do you have any comment on that, Professor Rahl?

Mr. RAHL. On your last question?

Mr. SEIBERLING. Yes.

Mr. RAHL. Well, I may have misunderstood you, Congressman Seiberling, but I think you were saying that if the joint venture had a substantial and direct effect on foreign commerce——

Mr. SEIBERLING. On exports or imports.

Mr. RAHL. This bill reads "direct and substantial effect on trade or commerce within the United States."

Mr. SEIBERLING. Well, that's right, and I am trying to find out if the fact that exports or imports were affected can be construed as having an effect on trade within the United States, because it would force prices to go up or down, and cause businesses not to export and therefore fail. It seems to me you could make an awful lot of argument that it had an effect within the United States.

Mr. RAHL. I agree with you. I think this is a point that bears careful attention by the committee, and it is the trouble always with trying to draw this kind of line between what affects U.S. commerce within the United States and what affects foreign commerce, because economically they are often not only interrelated but quite often inseparable.

Mr. SEIBERLING. As I read this, your point is well taken, it does repeal the foreign commerce words in the Sherman Act. But you just have to go one further step. You'd have to show that the fact that the conduct affected the foreign commerce of the United States had an effect on trade and commerce within the United States that would be one further burden the prosecution would have. But there is apparently, in your opinion, still an ambiguity; or the bill still doesn't give complete protection, put it that way.

Mr. RAHL. To some extent there is a futility in trying to legislate against something that will tend to defy the legislation. That is, you can't really draw a clean line between these two kinds of commerce.

Mr. SEIBERLING. I am inclined to agree with you. There is no justification for excluding foreign commerce from this bill. And while I see some benefit of limiting the effect of direct and substantial and foreseeable effects on trade and commerce, it ought to include foreign commerce of the United States. I don't think we have any right to prevent an American corporation from entering into a price-fixing agreement within Germany that affects only sales within Germany, assuming it doesn't violate German law.

But once it gets to the point where it begins to affect what we can sell outside Germany, or vice versa, then I think we have a legitimate concern. And I take it you feel the same way.

Mr. RAHL. I do indeed.

Mr. SEIBERLING. You express some concern also as to the effect on cartel activities generally, and I thought you made a very interesting point in your prepared statement on that, in your review of past cartel practices prior to World War II.

But let me ask you this: A lot of things have changed. We have the Treaty of Rome and a lot of new laws in different countries. Do you believe it is possible for major cartels to readily form if their activities are proscribed by nations today?

Mr. RAHL. Because of the antitrust laws of other countries? Is that the point you're making?

Mr. SEIBERLING. Yes.

Mr. RAHL. If you are suggesting we should rely on those antitrust laws and not our own, I think it is turning it around.

Mr. SEIBERLING. At least to the extent where they don't have any substantial effect on our own trade.

Mr. RAHL. Well, I think that the growth of foreign antitrust law has been extremely important, and in particular the laws which tend to parallel ours to a great extent. These do make it difficult for cartels to function in Europe, at least, even irrespective of our law. That is quite correct. I think there are large parts of the world where that would not be the case, however.

Mr. SEIBERLING. Well, if we adopted this section 7 of the Rodino Act, or revised section 7, and every other country then did the same sort of thing, would this have the effect of immunizing international trade from antitrust laws?

Mr. RAHL. Well, I think it would to a major extent. That is, you would further be insulating each nation from the other in that way.

I have to admit I don't think it would be total in its effect because each nation would still have, as they do now, something like the "direct and substantial effect" on trade within a given country that this bill talks about. It could still reach many of the international cartels with that language, but if each nation passed a law like this it would certainly hammer another nail into it.

Mr. SEIBERLING. So you wouldn't advise clients to agree to restrain imports to this country?

Mr. RAHL. If this were passed?

Mr. SEIBERLING. Yes.

Mr. RAHL. No, I would not.

Mr. SEIBERLING. Do you agree?

Ms. FOX. Yes, I definitely agree. This is the thing we must protect most under our antitrust law—trade in the United States.

Mr. SEIBERLING. Does everybody else agree?

Mr. VICTOR. Yes, sir.

Mr. GOLDSWEIG. I agree to that, very much so. I feel it will be accomplished under H.R. 2326.

Going back, Congressman Seiberling, to your example of activity within Germany affecting the German market and not bearing on the U.S. market, I was unclear as to your conclusion there. Let me state what mine is. I feel that such activity, by virtue of the present legislation, which would be clarified under H.R. 2326, would not be a concern to the U.S. antitrust authorities and would not be a viable target of private suits under U.S. law.

Mr. SEIBERLING. Even without the change in the law?

Mr. GOLDSWEIG. Even without the change, under the Antitrust Guide, the activity as you postulated it would not be a target—almost certainly—but I must say "almost."

Mr. SEIBERLING. What about the other language that has been proposed?

Mr. GOLDSWEIG. Are you talking about the new bill, which I believe is 2812?

Mr. SEIBERLING. I'm talking about the discussion that took place with respect to the Pfizer problem.

Mr. GOLDSWEIG. I mentioned that. I am assuming there that we are talking about a situation where there has been impact on U.S. trade and commerce. I thought that your postulation bore on a situation where there was no impact on U.S. trade and commerce.

Mr. SEIBERLING. That is right, yes.

Mr. GOLDSWEIG. If there is no impact on U.S. trade and commerce, the mainline of thinking today, as set out in the Justice Department guidelines, is that there would be no U.S. jurisdiction. I said "almost certainly" because there have been aberrations and it is these aberrations that have grown out of proportion and resulted in too conservative antitrust counsel.

Mr. SEIBERLING. The aberrations have resulted in that?

Mr. GOLDSWEIG. Right. I would say their small numbers make them relatively insignificant unless you happen to be one of the targets.

Mr. SEIBERLING. That is what you have to advise your clients not to be.

Mr. GOLDSWEIG. Precisely. And H.R. 2326 would lend more certainty. Also, the legislative history that will be made in connection with it would further clarify it.

Absolute certainty, I submit, is not part of the human condition. I submit H.R. 1648, because of its vain quest for absolute certainty, probably has more pitfalls than H.R. 2326, and to boot you get a lot of administrative folderol with it.

Mr. SEIBERLING. Well, I am not holding any brief for H.R. 1648.

I may have some more questions to submit to the panel, but my time has expired. While none of the other members were here to complain, the witnesses may feel they are entitled to a little relief.

So I want to thank you very much. I think you have clarified my own thinking on this matter, and I'm sure the committee as a whole would express my feelings that we appreciate very much your help.

It is nice to see you again, Dr. Fox.

Ms. FOX. It's nice to see you, sir.

Mr. SEIBERLING. Does the staff have any questions?

[Discussion off the record.]

Mr. SEIBERLING. I am told Mr. Rodino plans to come back—and here he is now. So do you all want to stand up and stretch while he is coming in.

Thank you very much.

I must say, Mr. Chairman, you missed a very scintillating dialog.

Mr. RODINO. I'm sure that we will enjoy reading it.

Mr. Railsback.

Mr. RAILSBACK. Thank you.

Mr. RODINO. Excuse me. Would you mind deferring to Mr. Butler who is here now.

Mr. RAILSBACK. No, Mr. Butler is a little late, but let him go ahead.

Mr. BUTLER. I'm sorry to be late.

It seems to me that the critical argument in favor of the administration bill and the virtue most frequently claimed for it is that the certification process will provide a greater degree of certainty to exporters than will other bills.

I am interested first in your assessment of the administration bill, as to whether this is truly a certainty, and then, of course, how it compares with the Rodino-McClory bill.

I have before me the administration bill and the extensive description of eligibility and refinement in the certificate, and then we have the determination of the Secretary issuing the certificate when he deems it meets these requirements.

My question is: In the first place, what is the effect if the judgment of the Secretary is an inaccurate one or an illegal one in that the certificate does not in fact meet the requirements—I mean the exporter is not in fact eligible and yet the Secretary issues a certificate.

What is the effect on private enforcement of issuing the certificate?

Will you respond to the question raised and the qualms I have?

Mr. VICTOR. If I read the bill correctly—and I am not sure I do because it is a fairly confusing bill—I think if a certificate is granted that the conduct protected by that certificate immunizes the recipient from a lawsuit, especially a private lawsuit. That is what I think the bill says.

What it doesn't do is immunize the recipient from any suit concerning provable conduct which is ultra vires of that which was protected by the certificate.

And I am really a little bit confused as to what it does vis-a-vis the Justice Department if the Secretary of Commerce introduces the certificate but Justice doesn't agree. I gather Justice can, after a certain waiting period, actually go to court.

It is an unusual mechanism for someone seeking certainty.

Mr. BUTLER. Yes, sir.

Mr. RAHL. If I might add to Mr. Victor's comments, to put what he said in a different way, this bill would not prevent a treble damage suit. You could still sue, obviously. It doesn't say you can't do that. It just says that the association or company will not be liable.

So there is an immunity, provided it comes within the terms of the certificate.

But I think some of the latent uncertainty, which would become clear in a specific case, lies in such language as the terms of the certificate. I mean the certificate can't possibly remove all ambiguity and doubt itself, so there will be something to litigate in some of these cases, with the defendant claiming that the certificate covered what he did, and the plaintiff, of course, asserting that it didn't. You will just transfer the lawsuit to another level, but you will still have it.

Then the other point concerns the Justice Department's role or the FTC role. As I understand it, the bill would allow either to file a suit without delay as well as later. I may be wrong about that, but I think they could attack after the certificate has been authorized by the Secretary but before it has taken effect. There is a 30-day period or something like that in which they can file a suit. And then they also can sue later to revoke.

That suit would, as I understand it, be not addressed to whether this is a good thing or a bad thing under the antitrust laws; it would be a suit concerning whether the certificate meets the criteria of section 204(a), which are five or six in number. And there is a good lawsuit in every one of them.

Ms. Fox. I agree.

Mr. Goldsweig. Congressman Butler, I look to section 2 of H.R. 1648 initially in answering your question.

Section 2 sets out various standards that really amount to just what is set out in section 7 of H.R. 2326.

In other words, section 2 goes to the jurisdictional issue. It basically provides that to be eligible for an exemption you must be engaged in activity that does not impact on U.S. trade and commerce, does not restrain U.S. trade and commerce. That is, I submit, H.R. 2326, section 7, but with a lot more words.

H.R. 1648 then goes on to add administrative requirements which I think produce uncertainty rather than certainty. Looking at "(b) Exemption," the exemption is provided for activities that are—and I quote—"specified in a certificate issued according"—I emphasize "according"—"to the procedures set forth in this act, carried out in conformity"—I emphasize "conformity"—with the provisions, terms, and conditions prescribed in such certificate and engaged in during the period in which such certificate is in effect."

So, there are an awful lot of requirements that must be met, and they must be met while shooting at a moving target. International trade is a moving target. There must be daily decisions made as to what business opportunities to pursue. Sometimes, as I said earlier, there must be 180-degree changes.

I submit when aiming at such a moving target it would be difficult to comply with all the language in H.R. 1648, whereas H.R. 2326 would produce the same benefit much more simply.

Thank you.

Mr. Butler. I yield.

Mr. Rodino. Thank you very much.

Mr. Railsback.

Mr. Railsback. Thank you, Mr. Chairman. I wonder if there is possibly any kind of a middle ground with respect to the certification procedure that would perhaps permit some kind of presumptive validity. I know Jim Rahl mentioned his concern that what H.R. 1648 does is grant a virtual, absolute immunity, and I think you said virtually the same thing.

I am just wondering, if we are going to go ahead with some type of a certification procedure, I believe this could eventually lead to litigation, so that may be another problem, too.

But I wonder if we couldn't do something that would give some kind of a presumptive validity within certain parameters or guidelines.

I wonder if you have any comments on that.

Mr. GOLDSWEIG. Congressman Railsback, I believe there already exists such a middle ground, and that is the business review clearance of the Justice Department.

Mr. RAILSBACK. OK, then I understand what you're saying. I think I have only 5 minutes and then I am going to turn it back to you or whoever wants to speak.

I gather that one of the purposes of this legislation, as I understand it—at least this is the thrust of the Baldrige statement—is that we are not as concerned about big business that right now is doing very well in exports. I understand that we are still doing very well from an export standpoint. However, one deficiency appears to be that perhaps some small companies are an uptapped resource for exports from this country and because of their small size may not have the means to hire legal counsel to go through the necessary and complicated procedures, and may thus feel that they are getting into trouble on a joint venture.

I'd like to ask either one of you what your response is as to the different situation between the small and the big companies, and whether there isn't some truth to the Baldrige statement that maybe this would be really helping small companies.

Mr. RAHL. I think there is a lot that can be done for the small companies. The question here is do you have to have this kind of antitrust exemption. This morning there was reference to the report of the President on export promotion and disincentives. There are real impediments to exports, none of which are specific to antitrust.

But as far as this legislation is concerned itself, as I said before, I would favor the export trading company amendment. I think that is a good idea. The question is: Do you have to have this exemption? I don't think it's needed.

Recently some of us heard the head of the Mitsui Co.'s American subsidiary, who said that they have a quite successful business from the United States in exporting American goods. I asked him if he had or needed an American antitrust exemption, and he said, "No, we don't need it."

I think the trading company is a good idea. As far as associations are concerned, Webb-Pomerene is there now.

If you make the change that you are asking about in this immunity under the export trading company bill, then the law would be very similar to what we now have.

Mr. RAILSBACK. Yes, I see.

Mr. GOLDSWEIG. I would just like to add to what Professor Rahl has said. At the conference (I chaired it at the Japan House in New York City on February 27, 1978) where the Mitsui representative spoke, there was considerable debate as to what was really needed to help with U.S. exports, and many experts there held the view that developing exporting skills was most important; the real issue was the ability of the U.S. companies to master the intricacies of exporting, not any particular legal inhibition. It was recognized by various very knowledgeable people at the conference that the

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export skills might be best mastered by small companies, by groups of them acting together thereby benefitting from economies of scale.

The Japanese example of group activity discussed at the conference seemed to demonstrate that the present law, with the exception of the aberrational cases, would already permit such group activity. The Japanese seem to be recognized as the consummate joiners-together. They work very closely together in exporting/importing their products. Yet, I don't believe that there is any history under our law indicating that they have been impeded in these activities.

Mr. RAILSBACK. Could I ask, Mr. Goldsweig: In adding foreseeability to the direct and substantial impact standard, don't we run the risk that a court may require proof of subjective intent? In other words, rather than applying a "reasonable person" standard, might it be necessary to prove that the individuals saw in advance the effect of competition on domestic competitors?

Mr. GOLDSWEIG. I would hope not, Congressman Railsback. I think the test should be what is reasonably foreseeable. Otherwise there might be a premium on being dumb. I wouldn't want that.

I would emphasize that by suggesting foreseeability in my statement beginning on page 11, I made the suggestion in as mild a form as possible, since probably foreseeability goes hand in hand with intent and substantiality and directness. I made the suggestion only to be sure that there wasn't an ambiguity, to be sure that, in fact, the language "direct and substantial" did encompass foreseeability.

Mr. RAILSBACK. Could I ask one more question of Mr. Rahl.

I gather in reading your statement that you have reservations about both of the bills other than the study commission bill.

Is it fair to say that your concern about the Rodino-McClory bill stems from the fact there may still be a great deal of uncertainty if you adopt that approach, in other words, litigation—where you have to prove domestic impact?

Mr. RAHL. I think you are thinking something, Congressman Railsback, that I should have thought. There is a lot of uncertainty in the bill. This wasn't the primary gist of my statement, but it would be of concern.

I think the "direct and substantial" test is ambiguous; it is bound to be. It is litigious in nature. But perhaps if you take this kind of approach you probably can't do much better than that.

I would have other language that I might suggest, but I'd like to say I think these are all questions that need further study. My belief in the study commission bill is not based on a desire to delay things; it is a desire to wait until we know what we are doing a little better than I think we do now. And I have a number of things I could suggest myself.

Mr. RAILSBACK. Would any of you be willing to do that? If you have any changes that you think would improve the bills, would you submit those changes?

Mr. GOLDSWEIG. I'd like to very briefly comment on the study commission. I feel that H.R. 2326 is very fortunate in having the benefit of many long years of study.

First of all, there are the Justice Department guidelines, and I believe that H.R. 2326 is fully consistent with the experience there, with the language there, and therefore I view the Justice Department activities as tantamount to a study commission.

Professor Rahl, of course, has rightly pointed out that the Justice Department guidelines are only a few years old, about 4 years old, and maybe that is too short a period on which to base any decision. But I submit a study commission would last for a far shorter period, No. 1; and No. 2, the guidelines do not purport to be, and in fact are not something new but rather a restatement of the main thinking in the law for many, many years. They go back to *Alcoa* in 1945, which is but one example indicating the great length of time that some of the principles in the guidelines have been tested.

Therefore, I would propose that H.R. 2326 could move ahead at the present time based on the great deal of study that has already been done.

Perhaps the subcommittee could make itself more comfortable and benefit more from the study work that the Justice Department did by hearing the testimony of, for example, Don Baker, the principal author of the guidelines, or another author of the guidelines, Douglas Rosenthal. Their testimony might help short circuit the process and enable you to benefit from the great amount of work that has already been done in this area.

Mr. RAILSBACK. That is all I have.

Mr. RODINO. Thank you very much.

I want to follow up. I don't want to impose any longer on each of you panelists. But first of all I find myself in agreement with Professor Goldsweig, especially, of course, in light of the fact that he supports the bill that we are presenting, but more importantly because I think he makes quite a point when he emphasizes that for a period of time now we have had the antitrust guidelines and know about some of the inadequacies of Webb-Pomerene, and we recognize the need to do something in order to move more aggressively in foreign markets. And, frankly, while I am all for studies, I wonder if studies and commissions don't study to the point where it leads to more questions and more study, and whether or not the need for legislation is not here and now, after adequate hearings, after hearing from the people in the community that would be affected and the people in the legal community that interpret the laws. I think that we have to try to deal directly with this proposition we are confronted with, and that is that there is confusion out there and we recognize it as a premise, and although we shouldn't do anything to in effect lessen competition, nonetheless we should move into other areas where we feel the need to move. And why don't we do it directly? Why are we just looking on and saying, on the one hand, "Well, H.R. 2326 fails in this respect and H.R. 1648 fails in this respect," and not saying that there is a need to do it now, to move legislatively?

I mean, do we have to wait for another commission? And what length of time? And what questions are going to be answered?

I think there is enough experience presently before us to proceed with the responsibility that is ours to exercise.

Professor Rahl, I would like to ask this question, therefore, of you: What do you think that a study commission, frankly, could achieve that we, as a legislative committee responsible for attempting to do that which needs to be done, cannot do effectively?

Mr. RAHL. The bill wasn't my idea, Congressman, but I think the study commission should investigate the question of whether legislation is needed at all, and then what kind of legislation would be best addressed to it.

This committee obviously is highly qualified to make these determinations itself, but I doubt that you have either the time or the studies underway to really answer those questions.

In other words, I don't think the question now is the question of what language should go into a bill. The question is what kind of thing is needed. And I believe that the record on this is not eminently clear.

Mr. RODINO. Let me ask you, Professor Rahl, because I believe you raised most of the questions. The panel has seemed to agree that H.R. 1648 does require more bureaucracy and sets up a system whereby we are going to require certain certification, and indeed raises the question whether the Commerce Department itself would be able to insure that there wouldn't be the possibility of suits developing—I don't know either. And I am wondering as between H.R. 1648, with all that it impends, and H.R. 2326, even with its inadequacies, which of those do you see as a likely vehicle to move forward on?

Mr. RAHL. There was a ballplayer named Hobson one time, Mr. Chairman, and I know now how he must have felt.

I don't favor either bill for different reasons. I think that your bill, H.R. 2326, could be a much better bill than it is now. And I think if it were made much better, it would be preferable to the export trading company bill.

At this point one of my big problems with it is that in my opinion it is much too broad in what it does. I think it hits a problem that ought to be dealt with on a fine-tuned basis with a tremendous wallop that I think will do a lot of damage that you are not considering at this point, that is latent and we may live to regret. So I think it would be better advised——

Mr. RODINO. Well, we are going to welcome suggestions from each of you, and frankly, while we are here, we are responsible to write the legislation if we do conclude there is a need, and right now that seems to be the direction we are going in. And I would hope you would provide us with whatever suggestions you may have. We have already had some suggestions from both Mr. Goldsweig and Ms. Fox. And I think the letter review is something we would indeed consider. I think while foreseeability may be fraught with some problems, that, too, is something we would seriously consider. I think it adds to our thinking, at least.

And I would like, Professor Rahl, since you expressed yourself on this, if you would, as you have more time to contemplate this, send us your suggestions, and we will have our staff be in touch with you.

Mr. RAHL. I promise, Mr. Chairman, I will work very hard on it. I can't promise success.

Mr. RODINO. Well, you know, I have found from time to time that at this end we have many well-meaning witnesses who come in and they provide us with a wealth of information which is really very useful and very interesting, and then when we get down to the nitty-gritty of trying to put it all together and we ask for some suggestions, we really mean it sincerely because we know we are not the ultimate. We would hope you'd do that because it would help us in the end in achieving what we are trying to do here now.

With that, unless there are any further comments, I will conclude.

Yes.

Mr. GOLDSWEIG. I want to take just a moment for a closing observation. I note that the Secretary of Commerce this morning testified to the effect that H.R. 2326 didn't go far enough and that is why he favored H.R. 1648. I note that Professor Rahl is concerned that H.R. 2326 goes too far, opens up too much. And I ask myself, since H.R. 2326 does not meet the approval of two people on vastly different ends of the spectrum, is it not perhaps almost perfect.

Thank you.

Mr. RODINO. Thank you.

With that, thank you. And this concludes today's hearing.

We will be setting another hearing which I think is scheduled for April 8.

Thank you very much.

[Whereupon, at 1:32 p.m., the hearing was adjourned.]

FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

WEDNESDAY, APRIL 8, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. (chairman) presiding.

Present: Representatives Rodino, Seiberling, Hughes, Hyde, Butler, and McClory.

Staff present: Alan A. Parker, general counsel; Warren S. Grimes, counsel; George Garvey, assistant counsel; and Franklin G. Polk and Charles E. Kern II, associate counsel.

Mr. RODINO. The committee will come to order.

Today we will be continuing our hearings on H.R. 2326, the Foreign Trade Antitrust Improvements Act, and we are delighted that this morning we have with us the former Associate Attorney General of the United States.

Prior to that, he served as the Assistant Attorney General for the Antitrust Division, Mr. John Shenefield.

Along with Mr. Shenefield, we have Mr. Atwood, who is presently serving with the firm of Covington & Burling.

He recently completed, together with Kingman Brewster, "Antitrust and American Business Abroad."

We have Mr. Martin Connor, who is Washington corporate counsel for General Electric Co. and advises General Electric on international trade matters and is here to testify on behalf of the Business Roundtable.

Mr. Shenefield, will you please come to the table. You may proceed as you see fit and we advise you that your statement will be inserted in the record in its entirety.

Mr. RODINO. We are delighted to welcome you.

Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

I want to join in welcoming Mr. Shenefield here today. I had the pleasure of serving with him on the National Commission for the Review of Antitrust Laws and Procedures, of which he was chairman, and I am aware of his equally distinguished service at the Department of Justice.

I know he is going to be of great assistance to us.

TESTIMONY OF JOHN SHENEFIELD, PARTNER, MILBANK, TWEED, HADLEY & McCLOY

Mr. SHENEFIELD. Thank you very much for those kind words. It is a great pleasure always and once again to appear before this distinguished committee which has in the past and will, I predict, in the near future, play a leadership role in the continued evolution of antitrust doctrine in its accommodation to evolving business circumstances in this country.

Noting that the statement is to be printed in full in the record, Mr. Chairman, with your permission, I will summarize it briefly.

It is obviously important for this country to be attentive to any efforts that can be taken to enhance our export activity and this committee and the other committees in the Congress that are attending to this problem are, of course, to be commended.

The precise role that the antitrust laws play in this situation is not altogether clear. I argue in my testimony that we ought to ask difficult questions about proposals substantially to amend or to relax antitrust law and enforcement.

We ought first to insure that there is an important public policy to be served before permitting change in the antitrust laws.

We ought to see whether there is any less restrictive way to accomplish those same policy purposes.

The testimony, as you will see, opts, therefore, in favor of the cleaner and simpler approach I believe to be embodied in H.R. 2326.

I do note, however, the alarm as to U.S. export performance. Such alarm seems a little premature. There is no question whatever that our trade performance overall is not as strong as it should be, but it is also quite clear that exports, as such, have showed steady increases and last year rose by $39 billion over the previous year.

Even if our export performance is not what we would like it to be—and it never will be—I suggest that there may be causes far more important of that lagging performance than the antitrust laws. But even if the antitrust laws are in some significant degree responsible for lagging export performance, it seems to me that we ought to be exactly sure that we do not do more than correct the problem and we do it in the way that provides the least cost to competition.

Then, Mr. Chairman, I deal with three proposals that have been made in this area.

First, H.R. 2459 which proposes the establishment of a commission to study the international applications of the antitrust laws.

Because the theme of much of the complaint about antitrust laws is not that they expressly and clearly forbid conduct that would be useful, but rather, that in their broad and general application, they produce uncertainty in the business community and that uncertainty has itself an inhibiting effect, it seems to me that it is difficult to argue against an effort to look closely at a situation before enacting legislation.

Indeed, the House version, H.R. 2459, introduced by Congressman McClory, sensibly lists precise issues to be examined as opposed, as contrasted with the Senate version, which is rather more general.

But if there must be substantive legislation enacted now before study is completed, it seems to me that H.R. 2326, introduced by the chairman and Congressman McClory, is the most hopeful way of proceeding.

It does not provide for the enormous and complex bureaucratic nightmare that is certain to follow enactment of H.R. 1648, the so-called trading companies bill.

It does approach cleanly and directly the definition of the scope of the application of the antitrust laws.

It attempts to set out a concept that is very difficult, indeed, to define, that is, that it ought to be the major concern of the U.S. antitrust laws to protect domestic markets and to protect export opportunities for American businessmen.

What anticompetitive conduct occurs that does not implicate those two concerns is very likely to be more clearly the concern of another country with its own economic regime.

I do suggest four amendments, four possible revisions for your consideration that do, it seems to me, offer some hope of refining and clarifying the effects of H.R. 2326.

I suppose, as much a matter of symmetry as anything else, I would prefer to see other sections of the Clayton Act and, if it is possible to define, the antitrust aspects of the Federal Trade Commission Act, also included within H.R. 2326.

Second, it seems to me that the Webb-Pomerene Act ought to be repealed. If it is going to be clear that the antitrust laws do not apply to activity in export commerce, there would be, it seems to me, no reason to retain a statute that permits exemption of that activity.

Third, and this is a difficult area, I would argue for inclusion of language having to do with foreseeability in the standard in section 2 of H.R. 2326 so that the language dealing with direct and substantial effect would instead require a direct, substantial, and foreseeable effect.

That would, I think, bring the bill clearly into line with Alcoa and the Antitrust Guide for International Operations, published by the Justice Department, which purports to set out prosecution policy in this area.

Finally, it seems to me that to the extent that we deal here with a claim of uncertainty and its inhibiting effect, we ought to try in an unrestrictive way, if possible, to provide certainty perhaps beyond that which the bill provides.

I have suggested in the formal testimony that the business review procedure of the Antitrust Division offers that hope. I have suggested the possibility that to enhance its effectiveness—and it's ineffective now because nobody uses it—it would be fair to require that the Department of Justice and treble-damage plaintiffs be bound by affirmative business review responses.

At least so long as those letters and those advices are in effect, it hardly seems appropriate for a private party to come to the Department, seek advice, get advice or approval, and nevertheless, risk the possibility that it will be prosecuted for a felony on the one hand or, more likely, be sued for treble damages on the other.

The difficult aspect of that, of course, is that it is very likely to result in a substantial increase in the time taken by the procedure.

Nevertheless, it seems to me that, all things taken into account, such a change is likely to be preferable.

I will address very briefly title II of 1648, the so-called Export Trading Act of 1981.

That does very little that we need to have done and entails clear disadvantages, including particularly an enormously confusing and complex bureaucratic procedure, the potential that the bureaucratic procedure created will itself be an export disincentive even more serious than the antitrust one we assertedly now have and finally, the fact that the substantive standards created in 1648 do not adequately protect domestic markets.

Mr. Chairman, therefore, I am most hopeful of H.R. 2326. It seems to me H.R. 2459 is also useful. I believe H.R. 1648 is a disaster.

I would be pleased to try to answer any questions you or the committee may have.

[The statement follows:]

STATEMENT OF JOHN H. SHENEFIELD, BEFORE THE COMMITTEE ON THE JUDICIARY

Mr. Chairman and members of the Committee, I welcome the opportunity to testify in connection with H.R. 2326 and related proposals regarding the international application of the antitrust laws.

I shall briefly discuss the need for additional legislation in this area. Then I shall evaluate several competing proposals and offer the Committee some suggestions for amendment to H.R. 2326, the major proposal now under consideration.

The Committee is to be commended for its close attention to the international competitiveness of the United States. While there may be disagreement as to particular courses of action, there is unanimity in support of reasonable efforts to promote the improvement of our performance in the global economy. As a nation once renowned for the Yankee traders we sent round the world, the United States can and should work to regain its competitive edge in the tough commercial markets beyond our borders.

It is an article of orthodoxy in the business community that the antitrust laws stand as an impediment to the international competitive performance of the United States. Specifically, it is believed that the antitrust laws hinder our export performance either directly, in that they prohibit certain useful arrangements and conduct, or indirectly, in that they inhibit risk-taking because of their confusing and uncertain application. Proposals to deal with this asserted impediment generally include the relaxation or curtailment of the application of the antitrust laws in international commerce.

Given our strong preference for the competitive free enterprise system as the mode of economic organization most likely to produce efficiency and diversity, there is a strong presumption against removing aspects of our economy from antitrust applicability. In order to make a case for creating an exception to the rule of competition, proponents of exemption, immunity or relaxed antitrust application should be required to demonstrate clearly that important policy purposes will thereby be served and that any costs that are entailed will by contrast be less significant. Even if the case for granting an exception to the general rule of competition is proved, the remedy ought to be limited to the least anti-competitive means possible to effectuate the governing policy purpose. It is therefore appropriate to apply that analysis to arguments for significant curtailment of the application of antitrust law to international commerce.

Assertions that the antitrust laws are an impediment to U.S. international competitive position have never adequately been supported by concrete examples. While ingenious advocates can imagine theoretical possibilities, practicing businessmen have either been unable or unwilling to present persuasive evidence.

Moreover, our export performance in recent years has been strong. Our exports were up $39 billion in 1980. The 1980 $26.7 billion trade deficit was more a result of massive imports of petroleum and petroleum products, which in 1980 rose by $18 billion, a 31 percent increase, than of lagging export performance.

It would not seem productive, therefore, to try to enhance our export performance by focusing on the antitrust laws—at the very most, a negligible factor in the export equation. Every major study of the subject in recent years has found causes of export difficulty far more significant than the antitrust laws. Inadequate promotional support by the government for export activities, export controls, taxation of foreign-earned income, the Foreign Corrupt Practices Act, and anti-boycott regulations, and environmental and safety programs and regulations all are generally thought to be more significant problems for the would-be exporter than the U.S. antitrust laws. Surely it would be wise to start with the more important causes first.

Those who insist nevertheless that the antitrust laws are a problem in the export context contend that the antitrust laws unduly restrict joint ventures, know-how licensing and exchanges, mergers and other forms of activity that are essential to successful export activity. In general these contentions are in error. Black letter antitrust law clearly permits most of them. Where there is some uncertainty, means exist for clarifying the situation. On the other hand where the arrangements would have significant adverse effects on domestic competition, they should not be permitted.

Advocates for significant curtailment of the antitrust laws in the international context further argue that, even if the antitrust laws properly applied do not hinder export performance, the generality of the statutes and their uncertain application are themselves impediments to innovation and investment by businessmen who fear treble damage actions and criminal prosecution. It is difficult to credit these assertions.

First, substantial efforts at clarifying the application of antitrust law to international transactions have been undertaken. In 1977, the Department of Justice issued The Antitrust Guide For International Operations, a clear, concise and highly revealing discussion of the way in which antitrust law applies to problems that commonly arise in the course of international trade. In addition, the Department of Justice and the Federal Trade Commission stand ready through the business review and the advisory opinion procedures to advise businessmen on an accelerated basis concerning proposals for specific conduct or transactions through the issuance of letters defining present enforcement intentions. While improvements can make these procedures more efficient and helpful, business review letters do nevertheless amount to highly reliable antitrust reassurance for any businessman inhibited by confusion over the law's application.

Given the absence of specific examples of export hindrance, the generally favorable results of export efforts in the last several years, the fact that antitrust law does not prohibit anything that is truly essential for export activity and finally that there are a host of ways to deal with the perception of uncertainty in the business community, it is only natural to conclude that proposals for substantive amendment to the antitrust laws are not in order. Yet the critique of antitrust applicability in this area continues unabated and proposals proliferate. While there is an anomaly in evaluating proposals to remedy a problem that in all probability does not exist, it does seem useful, given the momentum toward some form of action in this session of Congress, to comment on the wide range of proposals that have been introduced.

H.R. 2459, introduced by Congressman McClory, proposes the establishment of a commission to study the international application of the antitrust laws. The commission would examine a variety of issues, including the effects of the application of our antitrust laws on U.S. competitiveness and on foreign relations with other countries; the scope of the extraterritorial effect of the antitrust laws; the sovereign immunity, act of state, foreign sovereign compulsion and comity doctrines; and finally the application of the antitrust laws to joint ventures, mergers and distribution and licensing arrangements in international commerce.

The logic of studying a situation before enacting legislation is difficult to withstand. There clearly is a perception that confusion in the area has impeded export activity. An authoritative and comprehensive examination by experts could do more to illuminate the area. If the commission is forthright and objective, without prejudgment of the underlying policy issues involved, and proceeds in an organized, diligent and scholarly way to examine the alleged problems and competing solutions. To the extent it falls short of those standards, it could do more harm than good. Indeed, because many of the legal issues to be studied under H.R. 2459 go well beyond the antitrust laws to affect securities regulation, tax law, environmental and safety law and other forms of economic regulation, for instance, it would be coherent and efficient to examine the entire spectrum of law related to international trade and attempt to derive consistent solutions. Such an achievement really would provide significant benefits to the business community.

If we must assume, however, that some substantive proposals must be enacted, regardless of the need and before the study called for in H.R. 2459 has been completed, it is necessary to review the two major options facing the Congress, the complex regulatory approach embodied in H.R. 1648 [1] and the cleaner, more direct approach of H.R. 2326.

H.R. 2326, introduced by Chairman Rodino and Congressman McClory, makes the Sherman Act, inapplicable to foreign trade or commerce "unless such conduct has a direct and substantial effect on trade or commerce within the United States or has the effect of excluding a domestic person from trade or commerce with such foreign nation." H.R. 2326 also makes Section 7 of the Clayton Act inapplicable to joint ventures limited solely to export trading.

H.R. 2326 is relatively simple and direct, in contrast to the layers of intricate bureaucratic regulation prescribed by H.R. 1648. The practical effect of H.R. 2326 will be to deprive foreign consumers and foreign competitors of antitrust rights of action against American companies for conduct taking place in foreign commerce, so long as the conduct has no direct and substantial effect on domestic commerce. The result will be that courts trying treble damage cases will apply the same rules of subject matter jurisdiction as the Antitrust Division itself applies now as a matter of policy.

Regardless of the views one has about the plight of foreign consumers and competitors who are injured by anticompetitive conduct taking place within their own country, it is easy to agree that those are matters primarily for that country to deal with in the context of its own legal and economic system. It was evidently not the intention of the framers of the U.S. antitrust laws to reach conduct taking place in foreign countries without effects in the United States.

While H.R. 2326 is clearly the best approach yet suggested to deal with the alleged export problem, there are several recommendations that would serve to refine and clarify its effects. First, it should be broadened beyond the Sherman Act and Section 7 of the Clayton Act to cover all of the major competition laws, including the entire Clayton Act and the antitrust aspects of the Federal Trade Commission Act. Certainty in this area would be promoted by having identical jurisdictional definitions for all of the antitrust laws. Second, if H.R. 2326 becomes law, the Webb-Pomerene Act ought to be repealed. This Act, which provides for antitrust exemption for export associations, would be confusingly superfluous if the antitrust laws no longer apply to the exempted activities.

Third, in order most clearly to conform the statute's proposed standard to prevailing rules as set forth in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (2d Cir. 1945), and the Justice Department's Antitrust Guide for International Operations, the concept of foreseeability should be added to Section 7 of the Sherman Act as proposed in H.R. 2326. Language in the legislative history should make clear that the statute is intended to reflect accepted principles of antitrust law.

Fourth, it may be desirable to deal more directly than does H.R. 2326 with the claim of a perception of uncertainty in the business community. The business review procedure of the Department of Justice, while designed to provide certainty, has simply been ignored by most businessmen and their lawyers. The reasons for this attitude are easy to understand, but probably in error. There is the notion that the Antitrust Division will labor so long over a business review request that no timely assistance will be available. That notion is in error. Two years ago the Antitrust Division agreed to produce responses to business review requests related to export activity within thirty business days. Next, it is feared that the examination and analysis of the facts that must accompany response to a business review request may well lead the Department of Justice to open law enforcement investigations, thus subjecting the requestor to possible criminal or civil penalties. That is an extremely unlikely circumstance, and should be insufficient to deter businessmen from seeking review letters. Finally, it is said that the Division's response to the business review request will not be candid in that it may disapprove of conduct that nevertheless would not be prosecuted if undertaken. As a practical matter, disapproving business review responses are not issued unless the Antitrust Division would probably sue if the proposed activity were carried out.

To enhance the appeal of the business review procedure and to provide greater certainty, however, I would suggest consideration of an addition to H.R. 2326 that would have the effect of making the business review response, while it is outstanding, effective to preclude later criminal prosecution or treble damage actions. It would still be open to the enforcement agencies, following withdrawal of the business review letter, to obtain prospective injunctions. It would likewise be open to

[1] In this testimony I refer only to Title II of H.R. 1648.

injured U.S. companies to recover single damages. This change in the business review procedure could be accomplished by adding to the Clayton Act in appropriate places, as follows: "Not withstanding the foregoing, in any action hereunder, a business review letter issued by the Antitrust Division of the Department of Justice shall preclude, during the period it is in effect and only with respect to any conduct or activity approved therein, any recovery against any addressee thereof in excess of actual damages, and the cost of suit, including a reasonable attorney's fee."

Similar language to preclude criminal prosecution would have to be inserted into the Sherman Act.

Title II of H.R. 1648, on the other hand, with great fanfare from two successive Administrations accomplishes little. Its erection of a complex regulatory structure of certification, with provision for interdepartmental consultation, mandating multiple, uncertain and burdensome avenues of challenge and appeal, would in itself be a disincentive to export. The prospect of one agency of the United States government suing to overturn the ruling of another agency is hardly likely to reassure a business community seeking clarification and guidance. In addition, reposing the power to award certifications of exemption from the antitrust laws in the Department of Commerce is a misplacement of authority that could lead to abuse. The Department of Commerce has no antitrust expertise and can hardly be expected to be sensitive and sympathetic to the policy aims of laws that from time to time do impose restraints, albeit beneficial ones, on its business constituency. Title II of H.R. 1648, in short, is a nightmare.

In summary, while it is not at all clear that any substantive legislation needs to be enacted at this time pending the outcome of the study commission proposed in H.R. 2459, H.R. 2326 represents the best approach of helping to banish the perception of antitrust threat from the minds of American businessmen, with the least cost to competition in our own economy.

Mr. RODINO. Thank you very much, Mr. Shenefield.

Mr. Shenefield, you alluded to your preference that there be a commission to review the problem, and I take it that would be your preference, that we first have the study before we get into the other. But assume we go into the subject and then proceed with H.R. 2326 which you feel is clear and rather concise in the area we do want to address.

Would the consideration and the enactment, let us say, of H.R. 2326, preclude the necessity of going into a study commission?

Mr. SHENEFIELD. No, sir. I think there are a whole variety of areas that could usefully stand attention that are not covered by H.R. 2326.

There would be the difficult issue to be faced by the members of the commission whether they wished to revisit the subject matters addressed in H.R. 2326, but there are lots of other issues, including specifically the political problems worldwide that extraterritorial application sometimes brings, and specific doctrines, including acts of States, foreign sovereignty compulsion, and the like, which could usefully be examined by such a study commission.

Mr. RODINO. I take it, though, your testimony would indicate that if we are not going to proceed with the study commission proposal as our initial consideration that H.R. 2326 would, together with the amendments that you have suggested, do the job that we feel is necessary in order to clear the air of any confusion that does exist which might prohibit or impede some of the potential export traders from getting into the foreign markets.

Mr. SHENEFIELD. Yes, sir. I think it is the best approach.

Mr. RODINO. Mr. Shenefield, both of us, along with Mr. McClory and Mr. Seiberling, served on the National Commission for the Review of Antitrust Laws and Procedures; as you recall, the Commission's primary concern with the Webb-Pomerene Act was the danger of a domestic spillover.

If this bill would be suggested as a means to help the buyers in the United States who intend to export their goods, is there then an increased likelihood of a spillover into the domestic market for American buyers?

Mr. SHENEFIELD. Mr. Chairman, there is. That would be a terrible thing to do, it seems to me, in the aid of the effort that is undertaken here.

It would do precisely what we cannot afford to do, which is allow a rather precise problem abroad to infect the domestic economy.

It seems to me very hard to avoid that. In addition, it seems to me that you would require enormous additional resources in the enforcement agencies simply to police that kind of activity to be sure nobody in the domestic economy got a direct sale from those cartels.

I would hope that it would be possible to avoid that.

Mr. RODINO. You have been very cautious in advising that before we do proceed with any changes in the antitrust laws, we determine there is a demonstrated need, and once a demonstrated need has been indicated, the modification should be limited to the least anticompetitive alternative to satisfy the goal that we would like to achieve.

Mr. McClory and I, who cosponsored H.R. 2326, have limited the reach of the entire Clayton Act. How do you suggest that we go beyond that?

Mr. SHENEFIELD. It seems to me—and it may be more academic than practical—that if you are going to have section 7 of the Clayton Act embraced within this new approach that we ought to also include section 2 or the Robinson-Patman Act, section 3 dealing with exclusive practices, sections 8 and 10, dealing with interlocking directorates.

If you ask me what specific examples of those sections that I can now think of that would have great concern, the answer would be none at the moment.

On the other hand, you always raise the possibility that having different jurisdictional bases for different sections of the Clayton Act will lead ingenious lawyers to make an argument on that.

Mr. RODINO. On page 8 of your written statement concerning the comments on H.R. 2326, you state that it would do little more than codify the existing practice policy of the Antitrust Division.

Since the policy is not binding in civil litigation or on the Justice Department itself, wouldn't it be desirable that the Division's policy be codified, if it represents sound antitrust policy, knowing that we have issued those guidelines in order that we add to clearness and conciseness and therefore provide the prospective exporter with something more reliable to proceed upon?

Mr. SHENEFIELD. I believe it would. I did not mean to deprecate the effort here to say that it codified the policy. It seems to me that the policy is a wise one, and it should be binding. It is prudent, therefore, to codify it and that is a useful reason to proceed here.

Mr. RODINO. Finally, Mr. Shenefield, since you have had experience in overseeing the Antitrust Division of the Justice Department, since the Commerce Department in the proposal that it supports has estimated that upward of 20,000 firms would utilize the so-called certification procedure of H.R. 1648, have you any idea how great the administrative burden would be on the Justice Department if the Commerce Department prediction is accurate?

Mr. SHENEFIELD. The suggestion seems to me intrinsically incredible. But passing that by and assuming 20,000 is a number we have to worry about, the amount of resources required to deal coherently with that as an advisor to the Attorney General in the scheme that H.R. 1648 sets up is something like a 50 percent increase.

It would put the Department of Justice into a regulatory mode that it does not welcome and it would do so in a way that would threaten to engulf and overwhelm its normal law enforcement responsibilities.

It would seem to me to be unwise on resource grounds. We haven't mentioned the enormous resources that would be required at the Department of Commerce where they are quite literally starting from scratch with lawyers who have knowledge about the antitrust laws. I don't believe they have any residual expertise there at all.

Mr. RODINO. Thank you, Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

It was my original suggestion when the Export Trading Company Act legislation came before us in the last Congress that we should require approval by the Department of Justice with regard to the issuing of licenses so that this agency, which has charge of the enforcement of our antitrust laws, would be making the decision.

I think my suggestion did result in adding language to the bill as introduced in this Congress to require consultation with the Department of Justice.

Just as a followup to the chairman's question, what kind of dilemma would we have if the Department of Justice is consulted but doesn't necessarily approve the issuance of licences?

Perhaps we might be in the position where if asked to approve, they would have denied approval and actually disapproved. Then you would have a position expressed in one agency of Government which would be contradictory to the decision reached in another agency of Government.

Mr. SHENEFIELD. Indeed, I would expect that to be the standard pattern. It would seem to me not at all unlikely that you would have a Department of Justice disagreeing with the Department of Commerce.

I heard Secretary Baldrige testify 2 weeks ago to the effect that H.R. 1648 would be likely not only to produce certainty, but would decrease the need for lawyers to be involved in this effort.

If anything was likely to involve lawyers, it would be an internal bureaucratic squabble between departments with different avenues of appeal and enormous potential for challenge in hearings by coequal Cabinet officers. Certainty would not be likely to flow from that kind of procedure.

Mr. MCCLORY. In order to facilitate exports and pave the road for companies to expand their export activity, I agree that it would be well if we could eliminate threats of treble damages which are inherent in the existing antitrust laws.

You are recommending, as one of the amendments to the measure that is sponsored by Mr. Rodino and myself, that we add an amendment to relieve the exporting companies from the treble damage threat.

Do you not feel, however, that if we added that amendment, there would be a deluge of activity in the Department of Justice for companies wanting business review letters since if they got the letter they would be immunized from penalties that otherwise would be a threat?

Mr. SHENEFIELD. That clearly would be the result. Lawyers would have to think very hard and clients would have to be very reluctant before they would forego the opportunity to get a business review approval.

There would be, even in that situation, therefore, a need for stepped-up resources.

I don't think it would be anything like on the order of the increase that the chairman and I were talking about before for two reasons.

One, the Department has worked with the business review procedure. It would apply standards already existing under the antitrust laws as opposed to rather new standards H.R. 1648 embraces.

It would be enabled to examine a situation in-house and not be required to involve itself in an elaborate consultation process. There is a savings there.

Second, I believe that counsel and businessmen are used to dealing with the Department of Justice and they communicate a little better.

There would be an antitrust focus and not a balancing of antitrust and export enhancement factors.

Mr. MCCLORY. One of the reasons given for support of the Export Trading Company Act amendments is there would be greater certainty with regard to the license provided by the Department of Commerce.

Weighing these two concepts of the license on the one hand, and the business review letter on the other, which do you think provides greater certainty in assuring a company that its exporting activities would not run afoul of the antitrust laws?

Mr. SHENEFIELD. I don't think once you get out beyond the procedures that there is all that much difference between the two, particularly if some sort of business review letter amendment is put into H.R. 2326.

You are protected from certain kinds of action in the courts. Those effects are the same. Both can be withdrawn. On the other side of the ocean, you are equally exposed to any antitrust prosecutions abroad.

There are no differences there. So, they are roughly equivalent.

The uncertainty I see attaching to H.R. 1648 is in getting to that stage with the waiting periods, the hearings, and the contradictory and confusing bureaucratic scheme that has been set up.

Mr. MCCLORY. One question I would raise is whether or not the disclosures that companies are required to make would impede their application for an exemption under the Export Trading Company Act or for a business review letter.

How do you feel about that?

Mr. SHENEFIELD. I think the kind of disclosure required for the business review letter is likely to be a little more narrowly focused and conducted more efficiently than the mandated disclosure in H.R. 1648 where they set out a whole list of things that must be furnished in every case.

My prediction is, if H.R. 1648 were enacted, there would grow up in the District of Columbia an industry that was especially proficient in producing applications for certification under the Trading Association Act. It would become a cottage industry.

I don't think we ought to require information that isn't necessary and there is a variety of information under H.R. 1648 that probably isn't necessary.

Mr. MCCLORY. If under H.R. 1648, a license were obtained through misrepresentation, there wouldn't be any protection against prosecution, would there?

Mr. SHENEFIELD. No; that's correct, and there is an elaborate procedure set out for revocation and withdrawal.

Mr. RODINO. Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman.

Mr. Shenefield, it's good to see you again. I think I would quite agree with much of your testimony.

It seems to me that there are many more impediments to exports than the antitrust laws—many more significant impediments.

Nevertheless, there are some problems that exist in connection with the antitrust laws.

For example, having done some work in the foreign field myself when I was practicing law and trying to put together joint ventures between foreign and American companies, I am acutely aware of the problems. The fact that the Justice Department may sign off on a particular thing doesn't give me much comfort because of the treble damage aspects and others.

Nevertheless, while I think problems of that nature need to be addressed, and I think to some extent would be addressed by H.R. 2326, I have some real problems with H.R. 2326.

For example, I think your comment on page 10 of your remarks, your third suggestion, which is that foreseeability, should be added to the proposed section 7 of the Sherman Act, highlights a weakness in this section 7 which I would like to explore with you.

It says,

> This act shall not apply to conduct involving trade or commerce with any foreign nation unless it has a direct and substantial effect on trade or commerce within the United States.

I presume if the conduct started out and did not have such an effect and then a large cartel gradually grew between the participants, this section 7 is a continuing test so that at some point, if the cartel became very successful, this section would no longer protect it.

Is that one of the concerns that your point 3 is directed to?

Mr. SHENEFIELD. Yes. If the cartel is of foreign firms in which an American firm is involved—let's start with that hypothetical—the fact that it develops after the fact some effect of the kind described here on U.S. commerce, that would seem to me to be a situation in which foreseeability ought to absolve the American firm of any kind of retroactive liability.

Mr. SEIBERLING. All right.

Now, let's get to the point where foreseeability comes into play. I take it that the purpose of the foreseeability clause wording would be to mean that there wouldn't be liability ab initio.

At what point does the foreseeability take effect? In other words, suppose as they are going along, the effect becomes foreseeable, even though maybe it wasn't foreseen—this is going to have an impact down the road.

At that point, would they have to withdraw or forego the protection of section 7?

Mr. SHENEFIELD. They would and they should, it seems to me.

If the argument supporting this effort in general has any validity at all, it does not depend on there being some protection for anticompetitive activities that affect domestic commerce.

I have heard almost nobody suggest that we ought to sanction some overlap effect in domestic commerce. Once that effect becomes evident to anybody, including the participants, it seems to me there is an obligation to withdraw.

Mr. SEIBERLING. Would it be necessary, then, for an American to set up a monitoring system of the entire operation, even though such a system might be difficult in the practical world because of the activities of some of the other participants who are not domestically based?

Mr. SHENEFIELD. I would think that perhaps might not be necessary. The question of foreseeability would be a question of fact to be resolved in any litigation, and would depend on the reasonableness of the efforts taken to ascertain what the effect of the cartel would be.

I would feel comfortable as a defense lawyer arguing that a company that had not set up an elaborate monitoring system could nevertheless be reasonably alert in determining whether the effects were foreseeable, that is to say, I don't think you would have to require that sort of effort on behalf of American firms.

Mr. SEIBERLING. Do you feel that the use of words like "direct" and "substantial" and "foreseeable" highlights the near impossibility of getting certainty in this field and still avoiding the horrendous bureaucratic establishment that H.R. 1648 would produce?

Mr. SHENEFIELD. I think it is very difficult to get total certainty in the real world. I don't think it is possible in the antitrust world, any more than the real world.

It seems to me, however, that H.R. 2326, which deals with concepts that are roughly familiar—they are not exactly the same—to the antitrust lawyer, comes as close as you possibly can probably to the sort of certainty on which businessmen are required to operate in a lot of other arenas as well as the antitrust arena.

I am sure, as this process continues, there will be suggestions for small language changes here and there, but my own sense is that this is on the right road.

Mr. SEIBERLING. Your suggestion with respect to business review by the antitrust provision seems to me to have some merit. As you indicate, businesses have been reluctant to use that in the past for fear of highlighting things that maybe the Justice Department didn't know about and bringing their attention to it.

Businesses had the feeling they didn't get very much protection. If we could increase protection, there might be a greater tendency to make use of that and I think we certainly ought to explore that.

Professor Rahl testified in an earlier hearing that he would set a very bad example in foreign affairs by, in effect, saying so long as the cartel was outside of any impact on the United States, we don't care whether our people participate.

Do you feel that should be a concern of ours?

Mr. SHENEFIELD. I do. I guess if I were living in a perfect world, I would prefer that the question of whether antitrust impedes exports would be resolved on the merits and that the determination be that nothing is required to be done.

I do not like to be supporting, even to this extent, legislation that carves back the role of competition.

It seems to me the United States ought to have other policy concerns, that is, we ought to be pressing for the enhanced role of competition around the world and that has been the policy of this country.

We have been embarrassed, frankly, by the Webb-Pomerene Act and our sanctioning, therefore, of export cartels. On the other hand, it does seem to me that Professor Rahl's concern about producing a whole new regime of worldwide cartels, as was the case before and during World War II, is perhaps a little overstated. Since those days a vast number of countries—and this isn't clearly understood in this country—have enacted their own antitrust ways.

The German merger law in some ways is far more aggressive than ours. The European Community antitrust acts reach out in a way we would be unlikely to.

Therefore, we, in a sense, can feel a little more relaxed in leaving conduct unprotected by our own antitrust laws because it is likely to be picked up by some others and that is an area of uncertainty our own businessmen ought to be aware of.

Mr. SEIBERLING. My time has expired. Thank you.

Mr. RODINO. Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman. I, too, welcome you to the committee to testify in this matter of particular interest.

Even though you are now in the real world, it appears to me that you are somewhat more relaxed in your presentation, and I guess that is because you have found it is more comfortable.

Mr. SHENEFIELD. I knew it all the time, Mr. Butler.

Mr. BUTLER. We have touched on foreseeability in the last exchange. If we add this to the standard, are we not running a risk that a court may require proof of substantive intent? In other words, rather than applying a reasonable person standard, would it be possible that proof of intent might be required regarding the impact of anticompetitive conduct on domestic competition?

Mr. SHENEFIELD. I don't think we would be. If there were any concern about that, we could make clear by legislative history that we were picking up concepts already quite common in the antitrust jurisprudence, and therefore that the standards of reasonableness would be applied here.

Mr. BUTLER. We can make that clear in the legislative history. That would, you think, relieve us of that problem.

Mr. SHENEFIELD. My notion is that the concept of "direct substantial and foreseeable" carries some baggage with it.

It doesn't arrive undefined. It is a concept, I believe, that is reasonably well understood by the courts, and as it were fleshed out, it would be likely to grow as it has in other contexts.

Mr. BUTLER. You were present when Mr. Baldrige testified?

Mr. SHENEFIELD. Yes, sir.

Mr. BUTLER. My inquiry was why should Commerce administer the certification procedure under that legislation if they were invariably going to adhere to the recommendations of the Justice Department?

Mr. Baldrige's reply was, "If you want an answer, it depends on whether you want to aid this process or impede it." Further on, he said, "* * * but I have to say if it was left to Justice or the FTC, I do not think the intent of this bill would be carried out as well as if Commerce were involved."

Would you like to comment?

Mr. SHENEFIELD. Yes; I think that is a serious misconception of the role the Department of Justice has played in similar statutory schemes.

The Department is required to advise on competition implications all the time, and it does so in a neutral way, not, I believe, leaning or being biased toward enforcement or against enforcement.

Its business reviewers are far more affirmative than negative. In the research joint venture area, the Department has approved something like 95 percent of all the transactions proposed.

It seems to me Secretary Baldrige shares a misconception that is not correct.

Mr. BUTLER. I am trying to understand from my limited experience exactly how your business review single-damages approach would apply.

Presumably you have more than one conspirator. If one gets a business review letter and the other one doesn't, or if one gets certification and the other one doesn't, under the other legislation, then with joint and several liability, what happens to the treble damages under those circumstances?

Mr. SHENEFIELD. I think the situation one is more likely to greet is a group of companies that want to get together—it is not a conspiracy—but they want to get themselves organized. All of them would come as a group to present the facts to the Department. They would therefore each be, if you will, addressees of the business review response.

It seems to me the language ought to make clear that each of those people is protected. If there is a covert conspirator somewhere, it would not be protected. I think I would argue that the language of the statute dealing with explicit exemption authority would remove the concept of joint and several liability as to those explicitly exempted for that period of time.

I think, though, the metaphysics of that situation are complex.

Mr. BUTLER. Are you suggesting language today?

Mr. SHENEFIELD. There is a sample provision on page 12 of my testimony.

Mr. BUTLER. Does that language meet with what you suggested?

Mr. SHENEFIELD. I think it is a good first shot. It is in the context of section 4 of the Clayton Act and there would have to be similar of language added to deal with the criminal prosecution powers under the Sherman Act, and with 4(a) and 4(c), as well, which has to do with, among other things—the U.S. Government already only has single-damage potential—the States may seek treble damage. You have to deal with that problem as well.

Mr. BUTLER. Is it conceivable that the direct or substantial effect on the Commerce standard contained in H.R. 2326 could be found in the circumstances of the export product having been manufactured in this country which has obvious impact on a whole range of domestic suppliers, shippers, et cetera?

Mr. SHENEFIELD. It is manufactured in this country for export abroad?

Mr. BUTLER. Yes.

Mr. SHENEFIELD. My own suggestion is that if it is manufactured for export, while there will be effects, they would probably not fall within the direct and substantial category.

But I acknowledge to you that line is less a crisp line and more of a gray area.

Mr. BUTLER. Do you think the legislation should endeavor to draw it more precisely?

Mr. SHENEFIELD. I think this kind of formulation is about as clear as it is likely ever to get. I think it is an adequately clear basis on which businessmen can plan and lawyers can counsel.

Mr. BUTLER. We don't want to put the lawyers out of business. I yield back.

Mr. RODINO. Thank you very much.

Mr. Shenefield, and the other witnesses who are appearing here today, I would like merely to suggest there might be some other questions which we would like to ask, which we would send you in written form.

Would you please accommodate us?

I would like to give attention to some other recommendations that you mentioned which might be in the form of some amendments. You referred to the inclusion of the Federal Trade Commission and I was wondering whether or not you might consider a kind of amendment that might just refer to the FTC antitrust jurisdiction and not go beyond it as we are concerned with trying to keep the jurisdiction of whatever legislation we have within this committee and we want to deal with it exclusively.

Mr. SHENEFIELD. I will. Mr. Chairman, you will notice I finessed that problem in the testimony because it is an extremely difficult one, but I look forward to working with the staff in trying to arrive at language that would be helpful.

Mr. RODINO. Thank you very much.

Mr. SEIBERLING. May I ask one other question?

Mr. RODINO. Sure.

Mr. SEIBERLING. Since we are concerned primarily with export trade, why shouldn't this act, H.R. 2326, be limited to effect on export trade?

Why should it refer to trade or commerce with any nation? Why shouldn't it say export trade or commerce with any nation?

Mr. SHENEFIELD. It seems to me that your combination might not deal with commerce that isn't technically export in the sense that it leaves this country and arrives abroad.

I take it one of the areas of concern here is activities abroad by Americans that only in the loosest sense would be export. You would not adequately be dealing with that.

My own view is there would be nothing wrong with trying to exclude from the reach of H.R. 2326 any kind of import activity.

On the other hand, it's hard to see what kind of import activity wouldn't have the direct and substantial effect that is mentioned here.

Mr. MCCLORY. I think in the measure that Mr. Rodino and I are sponsoring, we want to relate it essentially to export trade and not to effects the domestic market with regard to import activities.

On the other hand, the international antitrust study commission bill that I judge you support could give attention to the effect of our antitrust laws on imports, especially imports which are carried on by domestic companies in cooperation with foreign cartels or foreign companies that might be monopolistic.

Mr. SEIBERLING. Let's take an example that is currently before us, auto imports from Japan.

It seems to me that under present antitrust law, if the Japanese companies got together on their own and agreed to limit their imports and assigned each company a quota, limit the import of Japanese autos in this country, that would violate the antitrust laws of the United States.

Mr. SHENEFIELD. Clearly. Right.

Mr. SEIBERLING. In the absence of some legislation or Government intervention, they would be subject to challenge.

Mr. SHENEFIELD. The only exception to that that is commonly discussed is if the Ministry of International Trade and Industry in Japan required them to limit.

Mr. SEIBERLING. If the committee or our own Government imposed some kind of quota, if the executive branch, through the Trade Act, worked out an orderly marketing agreement which had the sanction of our Government, then there wouldn't be a problem.

Let's assume neither of those things happened? How would this act affect them?

It wouldn't have any effect, as I see it, because clearly, if it were any significant limitation on imports of Japanese autos, it would have a direct and substantial effect.

Mr. SHENEFIELD. I agree with that.

Mr. SEIBERLING. So maybe it isn't necessary to limit the exemption to exports, but, on the other hand, I have a little problem seeing why, if our purpose is to promote exports, we shouldn't make that clear in the statute.

Mr. SHENEFIELD. Assume a subsidiary of an American company abroad that is a manufacturing subsidiary, and does not generally manufacture for import into the United States. If it joins a cartel of other manufacturers in that country and they together set the prices for sales into that country alone, it seems to me on the one hand you could argue that was not export commerce of the United States. At least it is not at all clear that it is.

The effect of this statute would be to remove that conduct from our antitrust laws, even though it is not export.

That is the area that might not be adequately dealt with if you inserted export conduct into the language of H.R. 2326.

Mr. RODINO. Mr. Hughes.

Mr. HUGHES. I have no questions, Mr. Chairman.

Mr. RODINO. Thank you.

Our next witnesses will be Mr. James Atwood and Mr. Martin Connor.

Please come up. You may proceed.

Will each of you be presenting a statement?

Mr. ATWOOD. Yes; we both submitted statements for the record, of course.

Mr. RODINO. Your statements will be included in the record and you may summarize, if you will.

TESTIMONY OF JAMES R. ATWOOD, PARTNER, COVINGTON & BURLING; AND MARTIN F. CONNOR, WASHINGTON CORPORATE COUNSEL, GENERAL ELECTRIC CO.

Mr. ATWOOD. I would like to say it is a pleasure to be before the committee in discussing this very important legislation.

I think it is quite remarkable that, despite the various quarters from which testimony has come before the committee, there has been considerable consensus on a number of basic points.

I would like to identify four areas where I see a consensus among the witnesses and, indeed, within the committee, and then explain why I think H.R. 2326 and its basic format is the appropriate legislation in light of the consensus reached on these four points.

It is a bit unusual that there is this consensus, perhaps, because some of the four points I will mention may seem at first blush a bit contradictory, but I think on further reflection, they prove to be consistent rather than contradictory.

The first point on which there is obvious consensus is the need to maintain a strong antitrust policy for U.S. domestic commerce. Nobody has questioned that. Along the same lines, it is agreed that whatever concerns we have about export competition in international trade that should not be a tail that is going to wag the dog. We have to maintain a strong U.S. policy for the domestic commerce.

Second, it is agreed by everybody that antitrust law does have an important role to play in international trade in certain particular areas, perhaps not generally, but in certain areas.

One vital area mentioned by Mr. Seiberling is the need to maintain competition in import trade because of the important effect that has on domestic competition and on the prerogatives of the American consumer.

Another area where antitrust clearly has a role to play in international trade is protection of export opportunities for American firms. The right to participate in export trade may not be an absolute one; it is one subject to the rule of reason. But I think it is agreed generally by all the witnesses the antitrust laws should continue to speak to an exporter's right to participate in export trade.

These, of course, are the two areas the Justice Department's Antitrust Guide has focused on.

Third, there is a general consensus that U.S. antitrust law should not be obsessed by a missionary zeal to protect competition within foreign markets or protect competitive conditions in those markets.

The effects and consequences in foreign markets ought to be primarily a responsibility of foreign law and not American law.

I think there are two basic reasons for this. First, for U.S. law to intercede on the question of foreign-market-effects can impose in some cases a self-inflicted wound on U.S. export competitiveness and provide disincentives to exporters that are unnecessary from the standpoint of our national interests and which may, in fact, conflict with the interests of the governments abroad most directly affected.

Similarly, the political difficulties which U.S. antitrust enforcement have caused from time to time have been exacerbated by this foreign market effects application of U.S. law. To redefine and clarify our law so that foreign market effects are carved out and made the responsibility of foreign law is, I think, a positive development in ameliorating the international political tension that now exists in the area of antitrust enforcement.

A final point on which I think there is consensus is that no effort should be made by the United States through legislation or through the courts that would substantially tarnish the reputation of the United States as an advocate of free, unimpeded competitive international trade. Whatever the committee does, I think it is important that foreign governments understand that we are not declaring economic war on them, that we are not granting hunting licenses to American exporters to engage in predatory and offensive conduct in foreign markets.

The problem for the committee is how to balance these four policy points and, more particularly, which points to address specifically by legislation and which to leave to the courts to work out through the common law method.

That is a difficult and sensitive task but I think H.R. 2326 handles the task very well in its basic approach.

In my testimony, I make a few suggestions on some drafting changes. Some of the other witnesses have made useful suggestions.

What I would urge is that basic approach of H.R. 2326 go forward.

The way H.R. 2326 handles this balance, of course, is by identifying certain relevant U.S. policy interests that will trigger the application of the Sherman Act and, therefore, U.S. antitrust laws and conversely, by clarifying that, if these U.S. policy interests are not affected, then the U.S. antitrust laws do not apply.

In other words, if domestic competition is affected, including through restraints on imports, or if the competitive opportunities of U.S. exporters are unreasonably restrained, then the antitrust laws will apply and they will apply to that extent.

Conversely, if a challenged restraint has its primary impact abroad, if foreign markets are the concern rather than domestic markets, then the matter should be left to foreign law.

I do not think this is a radical change in the U.S. law; it is more a clarification, more a reminder to the courts of what the basic objectives of the U.S. antitrust laws were intended to serve in foreign commerce.

Nor do I think that this clarification will be regarded by our foreign trading partners as on unfriendly, hostile act, as a departure by the United States from its longstanding commitment to competition in international trade.

We are not seeking to shield American companies from the full application of foreign antitrust laws when the interests of those governments are brought into play.

Undoubtedly, the Justice Department would continue its policy of antitrust cooperation with foreign officials, of assisting each other in enforcement measures, even when U.S. firms may be involved.

What the bill does is clarify an allocation of enforcement responsibility. If U.S. markets are principally affected, the U.S. antitrust trust laws should apply and we should accept and expect cooperation from foreign governments in the application of our law in that sphere.

On the other hand, if foreign markets are affected, their law should apply and they should properly expect the United States through judicial assistance and enforcement cooperation to participate and cooperate in the application of foreign law.

I think over time this allocation of enforcement responsibility would be a very healthy thing, if for no other reason because it will encourage the development of foreign antitrust programs that will be similar to ours. It will make more understandable to foreign governments some enforcement actions which the Justice Department properly must take from time to time in international trade, and will bring about over time a better, clearer, more effective regime of antitrust cooperation across borders.

So, for these basic reasons, I commend the committee for consideration of H.R. 2326 and recommend its very serious consideration and prompt passage.

[The statement follows:]

Statement Before the

Committee on the Judiciary

House of Representatives

on

The Foreign Trade Antitrust Improvements Act

of 1981 (H.R. 2326)

James R. Atwood*

April 8, 1981

I am pleased to present these views, which are entirely personal, on H.R. 2326, the Foreign Trade Antitrust Improvements Act of 1981.

Objectives of the Bill

H.R. 2326 would clarify and sharpen the scope of the U.S. antitrust laws as they apply to American foreign commerce. The bill would reaffirm that the Sherman Act applies to conduct that restricts competition

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* Member of the District of Columbia Bar. Formerly Deputy Assistant Secretary and Deputy Legal Adviser, U.S. Department of State (1978-1980); Acting Professor, Stanford Law School (1980). In May 1981, I will be resuming law practice at the firm of Covington & Burling, Washington, D.C.

The views presented in this testimony are my personal views alone. A fuller treatment of the basic points can be found in Antitrust and American Business Abroad by James R. Atwood and Kingman Brewster (rev. ed. 1981).

in American markets and that restricts the export opportunities of United States firms. But where these United States interests are not adversely affected, American export trade would not be regulated by the Sherman Act. The bill would thus make clear that the American antitrust laws do not protect foreign buyers and businesses as they operate in their own home markets; competitive effects in foreign markets are the proper subject of foreign, not American, law.

Additionally, the bill would amend section 7 of the Clayton Act to exclude from its coverage joint ventures limited solely to export trade. Such ventures would continue to be covered by the Sherman Act insofar as they affect competition within the United States or limit the export opportunities of other American exporters. However, section 7 of the Clayton Act would not apply.

Need for Legislation

H.R. 2326 would serve an important function by clearly defining the objectives which the U.S. antitrust laws should serve in American foreign commerce. Current uncertainty on the basic substantive scope of the Sherman Act has been damaging both to United States export interests and to American foreign policy objectives.

Current uncertainties. Two objectives of the antitrust laws are clear and uncontestable: (1) to preserve competition in American markets, including the competition provided by imports; and (2) to protect the export opportunities of American firms against unreasonable restraint or monopolization. These two objectives were identified by the Justice Department's 1977 Antitrust Guide for International Operations as the "cornerstones" of American enforcement policy in international trade.[1/] Quite properly, H.R. 2326 would not affect the Sherman Act's application where these two policy goals are threatened.

Current law is murky, however, on whether the Sherman Act extends beyond these two policy areas. The old Minnesota Mining decision[2/] suggests to some that export cooperation among American firms is suspect, even if domestic markets are not affected and even if no American competitors are damaged commercially.[3/] More recently, a line of judicial decisions has suggested that

1/ U.S. Department of Justice, Antitrust Division, Antitrust Guide for International Operations 5 (1977).

2/ United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

3/ In fact, in Minnesota Mining the court found both an effect on domestic competition and an adverse impact on competitive exporters. These points were not emphasized in the opinion, however, and whether they were crucial to the finding of illegality is not clear.

foreign businesses and consumers were intended to be protected by American law in their dealings with American exporters, even where the plaintiff's complaint deals with effects felt in foreign markets.[4/] None of these decisions is especially clear in its holding or reasoning, and contrary precedents can also be marshalled. But the notion persists that the U.S. antitrust laws were intended to require maximum competition in American export trade, regardless of where the impact of a restraint might be felt, who would benefit from it, or how this aggressive U.S. antitrust policy might square with the policies of those governments most directly affected.

Damage to U.S. export interests. Needless to say, these expansive interpretations of the Sherman Act leave American exporters in an unenviable position. They are worried that cooperative arrangements among themselves, intended to enhance the benefits from their export trade, might be subject to U.S. antitrust attack, not because of harmful effects in American markets or because of damage done to competing American exporters, but because of consequences felt in foreign markets by persons operating

4/ E.g., Pfizer Inc. v. Government of India, 434 U.S. 308 (1978); Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Cas. ¶62,378 (S.D.N.Y. 1978); Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610, modified in part, 383 F. Supp. 586 (E.D. Pa. 1974). But see National Bank of Canada v. Interbank Card Assn, 1980-81 Trade Cas. ¶63,836 (2d Cir. 1981) (anticompetitive effects within a foreign market are not sufficient to trigger Sherman Act jurisdiction).

or buying abroad. Export cooperation opportunities that would be beneficial to American firms and to the U.S. economy are discouraged, while foreign competitors are not subjected to similar inhibitions by their national antitrust laws.

But export cooperation among American firms is not the only affected area; broader problems for American export trade are created by this suggestion that adverse effects in foreign markets may be a basis for illegality even if the restrictive effects on American interests are minimal or, indeed, outweighed by beneficial effects. The potential significance of foreign-market effects can infect a wide range of transactions between an American exporter and his foreign distributor, joint venture partner, or customer. For example, an exclusive arrangement between an American manufacturer and a foreign distributor might be attacked not because it unreasonably forecloses other American manufacturers but because it limits the options of the foreign distributor.[5/] Here a transaction that, in balance, may be beneficial to U.S. export commerce might be frustrated because of perceived consequences in foreign markets,

5/ *Cf.* *Waldbaum v. Worldvision Enterprises, Inc.*, 1978-2 Trade Cas. ¶62,378 (S.D.N.Y. 1978).

even though the arrangement might be perfectly consistent with the laws and commercial practices of that foreign jurisdiction. The vitality and profitability of U.S. export trade can easily suffer from the dampening effects of the uncertainty of current law.

Foreign policy considerations. The notion that American antitrust may govern effects in foreign markets affects more than just private interests; it also contributes to America's foreign policy problems associated with antitrust enforcement.

First, a strong and prosperous export trade is a vital ingredient for the United States' foreign economic policy. As mentioned, over-expansive interpretations of the Sherman Act and the uncertainties which they generate can impede U.S. export performance. Public as well as private interests suffer.

Second is a political point. The creeping application of American antitrust to foreign-market effects adds to the perception of many foreign governments that United States law is an unguided missile, intruding into matters of principally foreign concern without adequate justification. Under the expansive interpretations of the Sherman Act already discussed, foreign plaintiffs would be able to invoke American antitrust to frustrate the local industrial or social policies of their home governments.[6/] By making clear that effects in foreign markets are the domain of foreign rather than American law, H.R. 2326 would put American practice in a more rational and diplomatically defensible mode. No other country attempts to regulate effects in foreign markets through the enforcement of its own antitrust law.[7/]

A related point is worth consideration. H.R. 2326 would make clear to foreign governments that the protection of competition within their home markets is their responsibility, not the responsibility of the United States. The United States should stand ready to provide reasonable enforcement assistance to foreign

6/ Compare Linseman v. World Hockey Assn, 439 F. Supp. 1315 (D. Conn. 1977), with Crane Fruehauf Ltd. v. Fruehauf Corp., 1977-2 Trade Cas. ¶61,708 (S.D.N.Y. 1977).

7/ I should make clear that I am not suggesting that the United States abandon its controversial practice, frequently protested by other nations, of enforcing U.S. antitrust against extraterritorial conduct that has adverse effects within the United States. While this enforcement practice has generated most of the international friction associated with U.S. antitrust, it is simply too important from the standpoint of American interests to abandon wholesale. Moreover, it should continue to gain greater international acceptance as foreign antitrust laws develop and as American courts and prosecutors give increased weight to comity considerations. E.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). Some modifications of U.S. extraterritorial enforcement may be called for, but this is a separate subject from that addressed by H.R. 2326.

antitrust authorities investigating the conduct of American firms, and H.R. 2326 should therefore not be viewed as a "hunting license" for American firms to exploit foreign consumers or to cartelize foreign markets. Rather, it is an invitation to our trading partners to strengthen and develop their <u>own</u> antitrust programs, and where appropriate to scrutinize suspected conduct by American firms. Principal enforcement responsibility for unreasonable restraints in American export trade should be by those countries which may be damaged by such restraints, just as the United States reserves the right to apply its law to foreign firms whose conduct damages American interests.

By clarifying and defining this allocation of enforcement responsibility, H.R. 2326 would held alleviate the heated extraterritoriality debate now in progress between the United States and its trading partners. Foreign governments should increasingly see the logic and necessity of strong antitrust programs of their own and of the need, on occasion, for extraterritorial enforcement to protect their own consumer interests. In turn, enforcement action by the U.S. Justice Department when American consumer interests are affected would become more understandable to our trading partners. Moreover, the climate for mutually beneficial enforcement cooperation between American and foreign authorities would improve.

Thus I am convinced that legislation such as H.R. 2326, when properly understood and explained, will not be regarded as a retreat from America's devotion to a free and competitive system of world trade. True, it should free American exporters from certain unnecessary and inappropriate constraints lurking in American law. But the bill will not attempt to shield American business from the reasonable application of foreign laws, and indeed should serve as an invitation for the further development of national antitrust programs in other countries and for strengthened international cooperation in antitrust enforcement. Accordingly, H.R. 2326 should serve in the long run to advance the cause of vigorous, competitive international trade and to improve -- over time -- the enforcement stance of the Justice Department when it must act against foreign restraints of American import trade that are damaging to American consumers.

Legislative vs. Judicial Change

Although the objectives of H.R. 2326 are thus sound, a separate question is whether the Congress should provide the needed clarification in the law or, alternatively, leave that task to the judiciary. This is fundamentally a judgment for Congress to make, but I can offer a few observations.

A case can be made that H.R. 2326 is unnecessary and that the judiciary has the competence and authority to elminate current uncertainties in the law and to clarify and sharpen the Sherman Act's meaning in U.S. foreign commerce. After all, H.R. 2326 would simply reaffirm what I believe is the original Congressional intent of the Sherman Act. And since the Justice Department's Antitrust Guide for International Operations has stated an enforcement policy very similar to that contained in H.R. 2326, the prospects for more uniform and sound judicial interpretations of the Sherman Act are improved. Given the broad mandate contained in the Sherman Act for the judiciary to develop sound antitrust policy through the common law method, there is no doubt that the courts can set matters aright by adopting and adhering to a construction of the Sherman Act that would make H.R. 2326 entirely redundant. There are also virtues in the flexibility and self-corrective features of the common law method, and certainly frequent amendment of the Sherman Act to correct every judicial aberration should be avoided.

On the other hand, a strong case can also be made that the time for legislative intervention has arrived. The need for clarification in the law is strong and overdue. Also, Congress can provide the full background and explanation for what some will claim is a shift in American law. Again, it is important that foreign governments not view this development or clarification in the law as a declaration of economic war or as a rejection by the United States of competitive principles. Through the medium of legislative history, Congress can avoid any misunderstandings on this point.

<u>The Webb-Pomerene Alternative</u>

I was asked to comment briefly on the possibility of an expansion of the immunity provisions of the Webb-Pomerene Act as an alternative to H.R. 2326. In my judgment, that alternative is not attractive.

As mentioned, it is likely that the Sherman Act as originally enacted was intended to protect U.S. domestic markets and the export opportunities of U.S. firms, but was not intended to protect foreign buyers and businesses abroad. It would follow that export cooperation by American firms should not, by itself, ordinarily be a problem under American antitrust law, even in the absence of explicit statutory exemption such as that now provided in the Webb Act. This proposition is not as clearly engrained in the law as one would like, but I agree with the Justice Department's <u>Antitrust Guide</u> that it is a correct interpretation of the Sherman Act.

Legislative steps to expand and clarify the Webb-Pomerene exemption would, however, implicitly suggest the opposite conclusion: that the American antitrust laws may be violated by collective actions by U.S. companies vis-a-vis foreign buyers and competitors. By providing elaborate regulatory mechanisms for obtaining antitrust exemption, such legislation would strongly imply that firms which engage in export cooperation (or other export "restraints") without an exemption are fully subject to antitrust sanctions. Thus the more expansionist interpretations of the Sherman Act described earlier would arguably be obtaining Congressional confirmation. The Supreme Court in Pfizer cited the original Webb Act as evidence that -- absent explicit exemption -- American firms were vulnerable to foreign buyers for export restraints.[8/] I believe that the dissenting Justices were correct in concluding that the majority had misread the legislative history of the Webb bill, but the majority opinion remains as a warning that a strong negative pregnant may be read into an expansion of the Webb exemption.

All this would not amount to a substantial argument against expansion of the Webb-Pomerene Act if in fact that step would operate to free American exports

8/ Pfizer Inc. v. Government of India, 434 U.S. 308, 314 n12 (1978).

from unnecessary and inappropriate antitrust worries. But here it is worth remembering that the vast bulk of American export trade -- more than 98 percent in recent years -- has been conducted outside the Webb-Pomerene framework. This is not simply because the Webb bill was too narrowly drawn; it reflects instead a number of business realities as well as the understandable reluctance of American firms to subject themselves to cumbersome administrative procedures and regulations. There is no realistic prospect that legislative tinkering of Webb-Pomerene will dramatically affect its suitability for the bulk of American export trade. And, as just described, legislative steps to expand the Webb Act for the possible benefit of a few exporters would create new worries for the large volume of export trade that now operates outside the exemption framework.

In short, I am convinced that legislative expansion of the Webb immunity would intensify rather alleviate the antitrust concerns of the typical American exporter. H.R. 2326 does not share this substantial drawback.

Drafting Comments

The balance of my testimony addresses a number of specific points suggested by the drafting of the bill in its present form.

Section 2

1. Import commerce. I take it that the phrase "effect on trade or commerce within the United States" is intended to include import commerce. That is, conduct that restrains someone's ability to import freely into the United States will remain within the coverage of the Sherman Act. This of course can be clarified by legislative history, for it is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law.

2. "Direct and substantial effect." This language echoes that found in many judicial discussions of the jurisdictional reach of the Sherman Act. I recommend that the Committee make clear that H.R. 2326 is not intended to alter the jurisdictional scope of the Sherman Act. Nor should the bill attempt to alter that Act's substantive standards. Rather, the bill defines the Act's substantive scope by identifying what basic interests are and are not protected by the Act. Conduct in American foreign commerce that affects certain defined American interests are within the scope of the Act, although questions of jurisdiction and substantive standards for the conduct would be decided under existing precedents. Conversely, conduct that does not affect those interests would be outside the Act's application.

In order to avoid the suggestion that the bill was intended to alter jurisdictional or substantive standards, I recommend that the phrase "substantial effect" be used instead of "direct and substantial effect." The latter is phrased too closely to jurisdictional tests, and thus may suggest a rejection of "foreseeability" or comity factors that are also relevant to jurisdiction under current law.

3. "Excluding a domestic person." Just as "direct and substantial effect" suggests that the bill is intended to affect jurisdiction, the phrase "excluding a domestic person" suggests a desire to change existing substantive standards. ("Unreasonably restraining" would more closely paraphrase the existing standard.) In order to make the two provisos parallel and to avoid any implication that anything is being changed other than the Act's substantive scope, the bill might be rephrased to read: "unless such conduct has a substantial effect on trade or commerce within the United States or on the trade or commerce of a domestic person with such . . . ."

4. Voluntary restraints. I assume that the second proviso in section 2 is not intended to include voluntary export restraints. That is, the Sherman Act should not be read as prohibiting "restraints" which limit only the export commerce of those who voluntarily

agree to the restraint. An example, common among Webb associations, would be a marketing agreement under which exporter A undertakes to sell in South America and exporter B undertakes to sell in Africa. Even though A is thus restrained from selling in Africa in competition with B, the arrangement as a whole was presumably thought by A and B to be in their mutual interest and beneficial to their export trade. Thus it might be clarified in the Committee report that the proviso covers only the situation where an exporter is involuntarily restrained by the actions or agreements of others.

5. "Domestic person." Under both constitutional precedents and long-standing antitrust practice, aliens are generally afforded the same judicial treatment under American law as are citizens. This is an important principle from the standpoint of both foreign policy and equal protection. I would assume that the term "domestic person," accordingly, refers to businesses operating in the United States and to persons resident here, regardless of nationality. Similarly, an American firm's operations within a foreign market should have no greater protection under the law than would the identical operations of a foreign-owned firm. This might be clarified in the Committee report.

6. "Foreign nation." I recommend that this

phrase be plural rather than singular where it appears in section 2. The singular form suggests a narrow market definition for export commerce, inappropriately narrow in many cases. For example, an American exporter may wish to develop an exclusive arrangement with a major distributor in a small African country. There may be sound business reasons for making the arrangement exclusive, given the financial risks in the market and its thinness. Even if this exclusivity feature makes it more difficult for another American to sell into that market, this should not be a matter of American antitrust concern if there are an ample number of other foreign markets open to the competitor. A market definition limited to particular foreign countries would make sense if the bill were concerned with competitive conditions within that country, but the basic purpose of H.R. 2326 is to focus on the effect on U.S. exports as a whole, rather than on local effects abroad.

Use of the plural "foreign nations" would also conform to the phrasing used in sections 1 and 2 of the Sherman Act.

Section 3

1. "Joint ventures." In some instances there may be difficulty in distinguishing between transactions that form joint ventures and transactions that are simply

partial investments by one firm in another. To guide the courts on Congressional intent, the Committee report might make reference to the handling of this issue in the FTC's Brunswick opinion.[9] There the Commission accepted the "joint venture" rather than "partial investment" label because the transaction resulting in joint ownership included a pooling of technology and the development of a new product. The revitalization of an existing enterprise by collaboration between new partners to create new and different products or services should suffice.

2. "Shall not apply to joint ventures." I trust that this language means that section 7 should not apply to transactions which result in the formation or expansion of export joint ventures. The alternative reading -- that such joint ventures are exempt from section 7 in whatever transactions they engage in, and that the parents of the joint venture may be liable even for the transaction which forms the venture -- would obviously be troublesome. It might be useful, though, to clarify either in text or the Committee report that the exemption is for certain classes of transactions rather than certain classes of persons.

9/ Brunswick Corp., 3 Trade Reg. Rep. ¶21,623, at 21,781 (FTC 1979).

3. "Foreign nation." I suggest using the phrase "to a foreign nation or nations." Obviously, a venture should not lose the benefit of the bill simply because it serves several foreign markets rather than only one.

4. "Limited solely to export trade." This requirement may be unduly strict. In particular, a venture between two American firms may involve some foreign manufacturing or service facilities, as well as joint export efforts. Those foreign operations may complement the export trade or be quite independent of it. These purely foreign elements of the venture's operations should not deprive it of the exclusion under the bill. Clarification would be helpful because similar phrasing in the Webb-Pomerene Act ("solely trade or commerce in goods, wares, or merchandise exported") has been strictly construed.

5. Premerger notification. A parallel exemption should presumably be provided from section 7A of the Clayton Act, whose primary purpose was to facilitate enforcement against transactions that might violate section 7. This might be done in H.R. 2326 itself by an amendment to section 7A(c), or the Committee could recommend that the FTC and Justice Department provide the exemption by regulation under section 7A(d)(2)(B).

Mr. RODINO. Mr. Connor.

TESTIMONY OF MARTIN F. CONNOR

Mr. CONNOR. I am pleased to appear on behalf of the Business Roundtable to express the Roundtable's views on H.R. 2326. I don't think anything I am going to say is going to break the consensus to which Mr. Atwood just referred.

I am simply going to hit the high points of the written testimony which has been submitted.

In defining the proper scope of this country's antitrust laws, we think it is important to remember that our antitrust laws are unique in that, in most parts of the world, conduct that we prohibit at home is encouraged or accepted.

For example, U.S. law condemns trade restraints except in regulated industries. In contrast, many socialist nations, even those in the free world, openly restrain or prohibit competition, and others regulate far larger segments of their economies than we do.

As Mr. Atwood said, we believe foreign market effects should be left to foreign law.

The Roundtable agrees with the sponsors of H.R. 2326 that there is uncertainty today about the actual reach of our antitrust laws in foreign commerce.

This uncertainty adversely affects the ability of American businesses to enter into international transactions that would be highly beneficial and to compete effectively with foreign companies for a share of world markets.

We would recommend, however, that the language of H.R. 2326 be clarified in certain specific respects. First, we would urge that the scope of the bill be broadened to cover all of the antitrust laws.

Second, we have recommended that the phrase "regardless of whether such conduct occurs within or outside of the United States" be inserted in the second line of the bill.

We don't think there should be any doubt it is the location of the effects which controls, not the location of the conduct.

Third, we recommend as others have done, that the formulation "directly, substantially and foreseeably restrains" be substituted for "has a direct and substantial effect on."

We recommend the addition of the requirement of foreseeability, as has already been done this morning, and we recommend that it be made clear that the domestic effects which we are talking about are restraints on commerce.

As presently drafted and as I think came out in some of the questioning of Mr. Shenefield, the bill is silent on the kind of effect which might trigger antitrust jurisdiction.

Fourth, we suggest deletion of the final clause in proposed section 7 which would make U.S. antitrust laws applicable when activity in foreign commerce "has the effect of excluding a domestic person from trade or commerce with foreign nations."

We believe this final clause is redundant and unnecessary.

A direct, substantial, and foreseeable restraint upon a domestic competitor, if otherwise illegal, would be picked up by the prior clause, as we urge the committee to amend it.

Moreover, this clause could be read as an expansion of existing substantive law. For example, existing law does not, per se, prohibit exclusion of a competitor. After all, every contract necessarily excludes a disappointed bidder.

Fifth, we urge the committee to clarify the intent of the legislation with respect to antitrust damage actions. As drafted, the bill probably precludes damage suits based on foreign effects of alleged antitrust violations. There is, however, some ambiguity on this score.

For example, a foreign purchaser of U.S exports could argue that the defendant's conduct had domestic as well as foreign effects and that the existence of some domestic effects creates a basis for a damage action based on the foreign effects as well.

While this argument would seem to be without merit, we strongly urge that it be foreclosed expressly.

We have recommended a new subsection (b) to the proposed section 7 which we believe would accomplish this purpose.

Sixth and finally, the bill contains in section 3 a proposed amendment to section 7 of the Clayton Act that would exempt joint ventures organized solely for export trade.

With respect to this provision, we recommend that the phrase "whose sales are limited to exporting goods or services from the United States to foreign nations" be substituted for the phrase "limited solely to export trading, in goods or services, from the United States to a foreign nation."

Our concern is with the term "limited solely."

The Business Roundtable warmly supports enactment of H.R. 2326.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF MARTIN F. CONNOR, WASHINGTON CORPORATE COUNSEL, GENERAL ELECTRIC CO.

My name is Martin F. Connor, and I am Washington Corporate Counsel for General Electric Company. From 1963 through 1978 I was counsel to GE's industrial equipment business worldwide, with the greatest part of my activities directed at international transactions.

I am privileged to appear before you on behalf of the Business Roundtable to express the Roundtable's views on H.R. 2326, a bill to clarify the reach of the antitrust laws as they affect the foreign commerce of the United States. The Business Roundtable is an association of nearly 200 chief executive officers of major American companies. Most of these companies have substantial international business activities. The Roundtable's purpose is to examine public issues that affect the economy and to develop and present positions that reflect sound economic and social principles. The recently retired Chairman of the Board of General Electric, Reginald H. Jones, was a member of the Roundtable, and last year was its co-chairman. His successor as GE Chairman, John F. Welch, is now a member of the Roundtable and of its policy committee.

ROUNDTABLE SUPPORT FOR GOALS OF H.R. 2326

The Business Roundtable is pleased to report that it strongly supports the goals of this legislation. These goals, as we understand them, are to define and clarify the territorial scope of U.S. antitrust laws. The sponsors of this legislation have correctly observed that the international reach of these laws is uncertain, that this uncertainty has diminished export activity by American firms, and that the antitrust laws governing international transactions need to be clarified. We agree with these premises, and I can support them from my own business experience.

The bill's sponsors have also expressed their intention to limit the reach of antitrust liability to situations involving direct and substantial effects on our domestic consumers and businesses, to remove joint ventures engaged in export trading from the scope of Section 7 of the Clayton Act, and to reduce the potential for antitrust suits by foreign entities, including foreign governments. The Roundtable applauds all of these objectives.

REASONS FOR LIMITING APPLICABILITY OF U.S. ANTITRUST LAWS

In defining the proper scope of this country's antitrust laws, we think it is important to remember that our antitrust laws are unique in that, in most parts of the world, conduct that we prohibit at home is encouraged or accepted.

For example, U.S. law condemns trade restraints except in regulated industries. In contrast, many socialist nations, even those in the free world, openly restrain or prohibit competition, and others regulate far larger segments of their economies than we do. Even among countries with free economies, regulatory intervention is more pervasive, and administrative approval may be obtained to engage in otherwise anti-competitive conduct.

When foreign antitrust restrictions exist, they are far less stringent than in the United States. Substantial horizontal acquisitions are often approved in "the public interest," and vertical or conglomerate mergers are virtually unmolested. Practices such as resale price maintenance, restrictive patent licensing, and price discrimination are commonplace.

Similarly, foreign devotion to antitrust enforcement is less intense than in the United States. The amount of foreign antitrust litigation is trivial in comparison with the 1000 to 1500 antitrust cases filed in U.S. courts in each of the last ten years. No other nation of the world imposes the punitive sanction of treble damages on antitrust defendants. The combination of sanctions available in the United States, including criminal felony liability, parens patriae recoveries, class actions, and recovery of attorneys' fees is also unparalleled. In most nations with laws that resemble our antitrust laws, relief for private injury is unavailable, and criminal sanctions do not exist.

Not only do other trading nations of the world play by different rules, but they also have displayed growing hostility toward the extra-territorial reach of our antitrust laws. Many nations have laws on their books that prohibit cooperation with U.S. antitrust authorities, interfere with U.S. antitrust prosecutions and defenses, and negate the operation of our laws in their territories.

These gross disparities in economic systems raise fundamental questions of economic policy. Accepting the fact that our antitrust laws reflect a considered judgment about how businesses in the United States should treat American consumers and competitors, there is no imperative that justifies any longer—if it ever did—federal legislation declaring how our businesses should deal with overseas consumers or foreign competitors. Therefore, the Roundtable agrees with the premise of H.R. 2326 that there is no reason why our law should reach out to protect consumers in other nations whose governments have not chosen to protect their own nationals with competition statutes. In a pluralistic world, nations should be free to define their own domestic economic interests.

In this context, it is not only naive but futile to assume that U.S. antitrust laws can or will inject competition into foreign markets. The only way that this will occur is if foreign nations themselves adopt and apply antitrust laws to all those who enter their markets. The unilateral imposition of antitrust restraints on U.S. businesses engaged in foreign commerce simply disables U.S. firms from competing on an equal footing with their foreign counterparts.

Respect for these differences in legal and economic systems requires not only that our laws be well-defined, but also that they not be overly expansive in their reach. The Roundtable is committed to the proposition that our antitrust laws play a basic role in protecting the American free-enterprise system by helping to insure that consumers and businesses in this country receive the benefits of competition. Conversely, however, we see no reason why our laws should reach out to regulate transactions whose primary effects occur outside of our territory.

NEED FOR CLARIFICATION OF EXTRATERRITORIAL APPLICATION

The Roundtable shares the view of the sponsors of H.R. 2326, Chairman Rodino and Representative McClory, that there is considerable uncertainty about the actual reach of our antitrust laws in foreign commerce. This uncertainty adversely affects the ability of American businesses to enter into international transactions that would be highly beneficial and to compete effectively with foreign companies for a share of world markets. These problems warrant clear congressional definition of the proper range and focus of our antitrust laws.

Proponents of the status quo sometimes assert that the case for legislative action has not been made because businesses have not stepped forward with an accounting of specific business opportunities that were aborted for antitrust reasons. It is not surprising, though, that businessmen have not often volunteered to recount examples of the restraining effects of antitrust law on their international activities.

For example, antitrust considerations typically enter the picture long before a business transaction is explored in depth. If these considerations indicate problems, the possible transaction may die on the drawing board well before negotiations are commenced. In these circumstances one cannot ascribe to antitrust a lost opportunity that was never developed to the point of possible consummation. In many cases, antitrust concerns may even preclude preliminary discussions to explore a transaction. Equally important is the natural reluctance of firms to admit that potential antitrust violations ever even crossed their minds.

Nevertheless, it is not difficult to pinpoint the general classes of intentional business transactions that are restricted by the threat of antitrust problems, but from which that threat should be eliminated. These would include joint ventures or other arrangements among exporters that may involve the allocation of territorial responsibilities or the establishment of common prices or other terms of trade, technology licenses that restrict sales by the contracting parties to particular countries or regions, and offshore acquisitions that permit U.S. firms to enter foreign markets.

Judicial decisions are rife with inconsistencies regarding the types of effects on the domestic economy that must be demonstrated in order to establish U.S. antitrust jurisdiction over an international transaction. For example, courts have variously stated that U.S. antitrust laws apply if the conduct "affects" U.S. commerce,[1] or if the conduct "directly and substantially" affects U.S. commerce,[2] or if the conduct occurs with "the intent to affect" U.S. commerce,[3] or if the conduct has a "direct and influencing effect" on U.S. commerce.[4]

The commentators are also divided on the correct test to apply in determining whether there is, properly, U.S. antitrust jurisdiction over international business transactions. One authority asserts that the requisite effects must be direct or substantial,[5] while another declares that liability may arise either if the conduct occurs in the course of U.S. foreign commerce or substantially affects either foreign or domestic commerce.[6] As the Court of Appeals for the 9th Circuit pointedly observed in *Timberlane Lumber Co.* v. *Bank of America,* 549 F. 2d 597, 610 (9th Cir. 1977): "American courts have firmly concluded that there is some extra territorial jurisdiction under the Sherman Act. Even among American courts and commentators, *there is no consensus on how far the jurisdiction should extend.*" (Emphasis added.)

The Business Roundtable submits that no legitimate purpose is served by perpetuating uncertainty on this fundamental question.

I do not wish to leave the impression that the risks and uncertainties of antitrust are the most important barrier to the ability of U.S. firms to seize overseas business opportunities. There are, of course, hosts of business uncertainties confronting a firm that is considering its foreign trade potential. Antitrust is only one of these barriers. But it is an obstacle that Congress has the power to wipe away with clarifying legislation. This unnecessary barrier to American participation in world trade

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1 *Thomsen* v. *Cayser,* 243 U.S. 66, 88 (1917); *United States* v. *Imperial Chemical Industries,* 100 F. Supp. 504, 592 (S.D.N.Y. 1951); *see* 15 U.S.C. § 1.

2 E.g., *United States* v. *General Electric Co.,* 82 F. Supp. 753, 891 (D.N.J. 1949); *United States* v. *Watchmakers of Switzerland Information Center Inc.,* 1963 Trade Cases (CCH) ¶70,600 (S.D.N.Y. 1962); see J. Shenefield, Extraterritoriality and Antitrust—New Variations on a Familiar Theme (Dec. 10, 1980) (remarks before the International Law Institute).

3 *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 443–445 (2d Cir. 1945); *cf., Mannington Mills* v. *Congoleum Corp.,* 595 F. 2d 1287 (3d Cir. 1979).

4 E.g., *United States Timken Roller Bearing Co.,* 83 F. Supp. 284, 309 (N.D. Ohio 1949), modified, 341 U.S. 593 (1951).

The high-water mark of judicial expansiveness in applying the Sherman Act to conduct in foreign commerce was the *Minnesota Mining* case. *United States* v. *Minnesota Mining & Mfg. Co.,* 92 F. Supp. 947 (D. Mass. 1950). There, the court suggested that, even if concerted action in foreign commerce by U.S. businesses could not be shown to have any effects in the United States, it could in any event be condemned as a *per se* violation of the Sherman Act. The court speculated that coordination of efforts among the companies in foreign commerce might "reduce their zeal for competition inter sese in the American market." Id. at 963.

5 I J. von Kalinowski, Antitrust Law & Trade Regulation § 5.02 (1980).

6 J. Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws,* 43 Antitrust L.J. 521, 523 (1974).

can be removed while leaving intact the protection that the antitrust laws afford to American businesses and consumers.

OBJECTIVES OF LEGISLATIVE CLARIFICATION

In the Roundtable's view, legislative reform of existing law should achieve three essential purposes: First, any reform should specify that international transactions are not subject to U.S. antitrust jurisdiction except to the extent that the conduct has direct, substantial, and foreseeable anti-competitive effects in the United States by restraining trade in domestic commerce. Second, legislative reform should eliminate liability to foreign purchasers of products or services that are sold for export, leaving those purchasers to assert whatever legal rights their own governments have seen fit to create for conduct whose effects are felt within their territory. Third, legislation should eliminate other sources of liability, including government enforcement actions either by the Justice Department or the Federal Trade Commission, for injuries to foreign purchasers of U.S. exports.

These objectives, we believe, are consistent with the stated goals of the bill's sponsors. They are also consistent with the better views of legal authorities.

The requirements of "directness," "substantiality" and "foreseeability" as essential predicates for U.S. antitrust jurisdiction are presently embodied in the Justice Department's summary of controlling legal principles for evaluating international transactions.[7] Legislation like H.R. 2326 would refine and codify these fundamental principles and tests.

Although reform and clarification of the "domestic effects test" is crucial, it should be remembered that additional factors are and will continue to be considered in determining the propriety of asserting jurisdiction over international transactions and in assessing their lawfulness. As we understand it, H.R. 2326 is designed to establish minimum jurisdictional prerequisites. For example, in making these determinations, the federal courts would continue to consider the defendant's nationality, the relative interests of the United States and other nations that are affected by the transaction, the location of the conduct, and similar factors.[8]

In short, "direct, substantial, and foreseeable" United States effects should be essential—but, in a particular case, may be insufficient in light of the interests of international comity and of congressional intent—to warrant application of the U.S. antitrust laws.

For example, a limitation on potential liability so as to include only domestic effects is consistent with two sound and generally accepted propositions: our antitrust laws are fundamentally intended to protect U.S. consumers and business;[9] and standing to recover for injuries under the antitrust laws is limited to injuries of the type that the antitrust laws are intended to prevent.[10] As the Director of Policy Planning for the Justice Department's Antitrust Division recently stated, it is the Justice Department's enforcement philosophy "that it would be arrogant for the U.S. to attempt to protect foreigners abroad—that doing so is the responsibility of their governments."[11] Thus, there should be antitrust liability only to those persons injured within the United States by an antitrust violation.

PROPOSED AMENDMENTS TO H.R. 2326

Although the Business Roundtable supports the announced objectives of H.R. 2326, we recommend that the language of the bill be changed in certain respects for the purpose of further clarifying its impact. The text of these proposed amendments is attached to this statement.

First, we urge that the scope of the bill be broadened to cover all of applicable antitrust laws, rather than simply the Sherman Act. While the Sherman Act is probably the most important of these laws in the international arena, remedial leg-

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[7] See Department of Justice, Antitrust Guide for International Operations, Antitrust & Trade Reg. Rep. (BNA) No. 799 (Feb. 1, 1977); J. Shenefield, supra, note 2.

[8] See, e.g., *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc.* v. *Congoleum Corp.*, supra, note 3; Restatement (Second) of Foreign Relations Law of the United States § 40 (1965).

[9] See R. Bork, The Antitrust Paradox, Ch. 2 (1978).

[10] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Chrysler Corp.* v. *Fedders Corp.*, No. 78-1287 (6th Cir., March 18, 1981), discussed in Antitrust & Trade Reg. Rep. (BNA) No. 1007, at A-17 (March 26, 1981).

[11] J. Davidow, Extraterritorial Antitrust: An American View (March 12, 1981) (remarks before the International Chamber of Commerce Conference on Extraterritorial Application of Competition Law).

islation should also cover the Clayton Act—including the pricing strictures of the Robinson-Patman Act—and the Federal Trade Commission Act. The bill's "domestic effects test" standard should be equally applicable to pricing practices and distribution agreements, which are dealt with under Sections 2 and 3 of the Clayton Act (Section 2 is the Robinson-Patman Act), and to the broad range of antitrust-type conduct covered by Section 5 of the Federal Trade Commission Act. To achieve this important change, we recommend that, in the proposed new Section 7 of the Sherman Act, the Committee substitute the language "Nothing in this Act, the Clayton Act, or Section 5 of the Federal Trade Commission Act shall apply. . . ." for the current language of the bill: "This Act"—meaning only the Sherman Act—"shall not apply. . . ."

Second, we urge that the phrase "regardless of whether such conduct occurs within or outside of the United States" be inserted in the second line of the bill after the word "nations." This language would assure that the "effects test" is a two-way street that is applied regardless of where the alleged conduct occurs. The location of the effects should control, not the location of the conduct.

To give an example, if two manufacturers decide to engage in joint selling efforts in the Mideast, this statute should serve to protect them from antitrust liability regardless of where they meet and agree to act together. It would be nonsensical for the statute to afford them protection if they meet and agree in London, but not if they meet in New York.

The bill embodies a philosophy that the antitrust laws are intended to protect the American economy from restraints, and the insertion suggested above makes that very clear. We are concerned that, without this clarification, the bill might be understood as applicable only when the conduct is overseas. Our language shows that the geographic focus is on effects.

Third, we recommend that the formulation "directly, substantially, and foreseeably restrains . . ." be substituted for "has a direct and substantial effect on . . ." There are several reasons for this change. The requirement of "foreseeability" is added to incorporate the better view of existing law.[12] Any statute designed to stimulate American involvement in international trade by providing clear benchmarks for businessmen to follow should make the "foreseeability" of any domestic consequences an essential ingredient in the assertion of U.S. antitrust jurisdiction. This focuses the inquiry on a practical question that the businessman and his counsel can evaluate in assessing a proposed transaction.

In addition, the proposed language makes clear that the "domestic effects" with which the bill is concerned are "restraints" on commerce in the United States. As presently drafted, the bill is quite ambiguous on the kinds of "effects" that might trigger U.S. antitrust jurisdiction. The proposed amendment will avoid any contention that something like financial benefit to the U.S. exporter is a direct and substantial domestic "effect" that invokes the antitrust laws—a self-defeating interpretation that should be foreclosed.

In applying this "domestic effects" test, we would expect the courts to continue to look to the economic substance of the transaction, not just to its form. Thus, for example, the evaluation of the domestic effects of a sale would not be controlled by the technicalities of contract law. If a foreign purchaser buying from a U.S. company elects to use a U.S. purchasing agent here whose role is limited to transshipping the goods abroad, the effects of that transaction will be felt abroad, not here. It would make no difference, for purposes of U.S. antitrust jurisdiction, that title to the goods may pass in the United States before the actual export.

Fourth, we suggest deletion of the final clause in proposed Section 7 of the Sherman Act as it is now drafted. That clause would make U.S. antitrust laws applicable when activity in foreign commerce "has the effect of excluding a domestic person from trade or commerce with foreign nations." To the extent that this type of activity would be actionable at all as a matter of substantive antitrust law, the additional language is redundant. A direct, substantial, and foreseeable restraint upon a domestic competitor, if otherwise illegal, would be picked up by the prior clause, as we urge the Committee to amend it.

As drafted, however, the second clause may suggest an unwarranted expansion of existing law. For example, existing law does not, per se, prohibit exclusion of a competitor. After all, every contract necessarily excludes a disappointed bidder. It is often said, therefore, that the antitrust laws protect competition, not competitors.[13]

[12] See *United States* v. *Aluminum Co. of America, supra*, note 3, 148 F.2d at 444; Department of Justice, Antitrust Guide for International Operations, supra, note 7.

[13] E.g., *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra*, note 10, 429 U.S. at 489.

Not even exclusions by joint industry action are per se illegal. Instead, such exclusions are judged by the "rule of reason," which permits a group to exclude a competitor for good reasons, such as his production of shoddy or unsafe merchandise. The Sherman Act deals with this conduct under the general category of restraints, not separately. The clause that we urge the Committee to delete might create needless and unfortunate uncertainty regarding the impact of the bill on this settled body of substantive law.

The codification of the "domestic effects" test raises an important question of policy on which the Roundtable urges close consideration. As presently drafted, the bill may leave American-owned companies doing business abroad without protection when they are the victims of anti-competitive conduct launched from within the United States. We note that the sponsors of H.R. 2326 emphasized that the antitrust laws are designed to protect American consumers and American businesses. It appears that, as drafted, H.R. 2326 would exclude from antitrust relief a United States company with a manufacturing facility in Europe that bought price-fixed components or services from an American company engaged in a conspiracy. Whether it is consistent with American treaty obligations to allow the U.S. company to sue in those circumstances, when a foreign manufacturer could not, is an issue on which we take no position. Where American companies are involved in both ends of an export transaction, however, there is special basis to make our laws applicable, and less reason to object that application of our antitrust laws is an unwarranted encroachment on foreign prerogatives.

The Committee should carefully consider, therefore, whether American-owned companies making off-shore or overseas purchases, or purchases for their own export, should be excluded from antitrust protection. If the Committee concludes that it is desirable and proper to have U.S. antitrust laws applicable in this setting, then we would suggest adding appropriate language to achieve that objective.

Fifth, we urge the Committee to clarify the intent of the legislation with respect to antitrust damage actions. As drafted, the bill probably precludes damage suits based on alleged antitrust violations that injure foreign purchasers or consumers of U.S. exports. This conclusion would appear to follow both from the proposed limitation of the antitrust laws to domestic competitive effects and from the rule that antitrust damages are only available to compensate for injuries that the antitrust laws were intended to prevent.[14] However, the present bill leaves room for unnecessary ambiguity.

For example, a foreign purchaser of U.S. exports could argue that the defendant's conduct had domestic as well as foreign effects and that the existence of some domestic effects creates a basis for a damage action based on the foreign effects as well. While this argument would seem to be without merit under prevailing doctrine, we strongly urge that it be foreclosed expressly. Accordingly, we recommend the following additional language as a new subsection to proposed Section 7: "(b) If conduct involving trade or commerce with foreign nations does directly, substantially, and foreseeably restrain trade or commerce within the United States, then the parties engaging in such conduct shall be liable only for any injury so occurring within the United States by reason of such restraints."

The Roundtable views this clarification as important if this bill is to effectuate its premise and to protect American exporters. Our language would provide adequate deterrence against restraints that have substantial domestic effects, since anyone suffering an antitrust injury here could sue for treble damages. There seems to be no legitimate reason to confer a derivative right to sue on foreign purchasers—who are not within the zone of protection intended by U.S. antitrust laws—simply because domestic purchasers or competitors—who are the intended beneficiaries of these laws—would have a right to sue.

In this connection, we note that this provision would be fully consistent with the standard treaties of friendship, commerce and navigation ("FCN" treaties). Our proposed clarification does not turn on the citizenship or nationality of the protected plaintiff, but rather on the geographic location of the alleged injury. Thus, there is no basis for a claim of discriminatory treatment.

Moreover, these FCN treaties typically guarantee foreign nationals no more than access to U.S. courts, but expressly provide that the foreign national's substantive rights, if any, turn exclusively on the terms of the U.S. legislation.[15] Significantly,

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[14] *See id.*

[15] See, e.g., 1954 FCN Treaty Between the United States and West Germany, Art. VI(1), 7 U.S.T. 1839, 1845, T.I.A.S. 3593. See also, *Maiorano* v. *Baltimore & O.R.R.*, 213 U.S. 268, 274 (1909) (establishing this distinction in construing an FCN treaty with Italy).

many recent FCN treaties refer expressly to antitrust enforcement, but recognize that what each nation "deems appropriate" in this area is controlled "by its legislation." [16] Thus, the limitation defined in a new subsection (b) would be quite in keeping with international arrangements. It would simply implement the Executive Branch's position "that it would be arrogant for the U.S. to attempt to protect foreigners abroad—that doing so is the responsibility of their governments." [17]

If the Committee also decides to protect American firms engaged in off-shore purchases, in accordance with the discussion on pages 14-15 above, then appropriate modification should be made to our proposed subsection (b) to permit damage recovery for that injury as well.

Sixth and finally, the bill contains in section 3 a proposed amendment to Section 7 of the Clayton Act that would exempt joint ventures organized solely for export trade. With respect to this provision, we recommend that the phrase "whose sales are limited to exporting goods or services from the United States to foreign nations" be substituted for the phrase "limited solely to export trading, in goods or services, from the United States to a foreign nation." Our concern is with the term "limited solely." Any U.S. joint venture established to engage inexport sales of goods or services is likely to have some domestic activities as an integral part of its export trade: for example, purchasing supplies or services for use in its export business. This incidental domestic activity should not make the incipiency tests of Section 7 applicable, when the joint venture's sole business purpose is to engage in exports. Our proposal would more accurately reflect this intended scope of the exemption.

With these changes, and with consideration by the Committee of possible protection of American-owned companies doing business abroad, the Business Roundtable would enthusiastically support enactment of H.R. 2326. We would do so, not only because such legislation would remove unnecessary barriers to business opportunities abroad, but also because we are sure that these revisions of current law would not adversely affect American consumers or competitors at home.

ROUNDTABLE SUPPORT FOR RELATED PENDING BILLS

In supporting H.R. 2326 with the changes that we propose, we want to emphasize that, in the Roundtable's view, H.R. 2326 should not be taken as a substitute for other necessary legislation dealing with promotion of international trade and with refinement of the applicability of U.S. antitrust laws to that trade. Since a major objective of the proposed legislation is to remove unnecessary uncertainty and ambiguity, we believe that the bill should not be viewed as a substitute for other, specific solutions to particular problems.

The Roundtable believes, for example, that H.R. 2326 is a complement to, rather than a substitute for, H.R. 1648, the Export Trade Act, including Title II of that bill. That bill would permit U.S. businesses to come together and organize themselves into export trade associations, for the purpose of conducting joint business efforts in export trade. Under the licensing procedure that would be established by that bill, they could get advance government certification that the activities of their association would be exempt from the application of the antitrust laws. H.R. 2326 complements H.R. 1648 because it would provide similar protection for export transactions and related activity when U.S. firms elect, because of the nature and volume of their involvement in foreign commerce, not to establish an export trade association or to go through the licensing procedure.

While H.R. 1648 is directed at some of the same problems that underlie H.R. 2326, it deals with a narrower class of transactions, but ones in which the horizontal relationship among the participants may prompt prudent businessmen to seek extra assurance about the propriety of their conduct before engaging in joint export trade. Government certification under H.R. 1648 would provide that assurance.

While the Roundtable opposes unnecessary bureaucracy, the procedural requirements of H.R. 1648 have been subjected to careful development. In our view, it is desirable to make these alternate procedures available to those businesses who find

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[16] E.g., FCN Treaty with West Germany, *supra*, note 15, Art. XVIII(1) at 1858-59; 1951 FCN Treaty with Israel, Art. XVIII(1), 5 U.S.T. 550, 569, T.I.A.S. 2948; 1950 FCN Treaty with Ireland, Art. XXI(3), 1 U.S.T. 787, 801, T.I.A.S. 2155.

[17] Remarks of J. Davidow, supra, note 11. It is also worth noting that both the Justice Department and the State Department have testified that legislation to bar foreign governments from bringing suits under U.S. antitrust laws would be compatible with U.S. treaty obligations. Hearings on the Clayton Act Amendments of 1978 before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 2d Sess. 12-13 (1978) (testimony of Deputy Assistant Attorney General Ewing and Deputy Legal Advisory Marks.).

it desirable to act through a licensed export association. The additional level of certainty available to such associations may be especially important to smaller exporters, who may shy away from arrangements that would otherwise have to rest solely on complicated legal opinions about the probable effects of the transaction.

Similarly, H.R. 2326 is no substitute for *H.R. 2812*, legislation to modify the *Pfizer* v. *India* decision.[18] That case held, as the Committee will recall, that foreign sovereign governments may recover treble damages under U.S. antitrust law even though the U.S. government itself is limited to recovering single damages and even though the foreign sovereign nation does not outlaw the conduct about which it complains and does not afford reciprocal judicial rights to the U.S. government. The bill that has been introduced to deal with that unexpected expansion of the U.S. antitrust laws, H.R. 2812, focuses directly and effectively on the *Pfizer* decision and on its effect on pending litigation.

The Roundtable strongly supports the efforts to restore the status quo ante by enactment of legislation that overturns the *Pfizer* decision. We believe that such legislation should operate immediately, as H.R. 2812 would. Enactment of H.R. 2326 might achieve the same result, especially if the bill clearly forecloses suits by foreign purchasers, as our proposed Section 7(b) would. As a controlling legislative definition of U.S. antitrust jurisdiction, H.R. 2326 would probably have immediate application to any cases pending on the date of its enactment. However, the *Pfizer* bill, H.R. 2812, leaves no room for doubt on these issues.

CONCLUSION

On the basis of these recommendations, therefore, the Business Roundtable expresses its strong support for enactment of H.R. 2326, with appropriate amendments, and commends the bill's sponsors, especially the Chairman and the Ranking Republican Member, for their leadership.

Mr. RODINO. Mr. Connor, in your written statement you propose that a section (b) be added to H.R. 2326 to limit recovery to "injury so caused within the United States."

Mr. CONNOR. Yes, Mr. Chairman.

Mr. RODINO. Let me pose this situation to you. If a German manufacturer purchased goods in the United States for shipment to Germany and the price of the goods had been fixed by U.S. competitors, first of all, would there be an injury caused within the United States?

Mr. CONNOR. Presumably there could have been an injury caused in the United States by a price-fixing conspiracy. We could assume there was not, on the other hand, too.

Mr. RODINO. If not, where did the injury occur?

Mr. CONNOR. If there is no effect in the United States the injury would have occurred in Germany.

Mr. RODINO. In Germany?

Mr. CONNOR. Yes.

Mr. RODINO. What if a consumer buys goods from an American firm that doesn't engage in export activities and pays for the goods and takes possession in the United States, and if that firm is party to a price-fixing conspiracy that didn't distinguish between foreign and domestic? What if he takes the goods abroad and what if he uses them in the United States?

Mr. CONNOR. I think the logic of our position would be to say if the transaction were a U.S. commercial transaction, if this were a purchase in the United States under U.S. law, there might be effects in the United States and these should be actionable.

If this were a German transaction, if the injury occurred in Germany, it would not be actionable under our proposal.

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[18] *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978).

Mr. RODINO. Let me go a further step in your suggested amendment. A Swedish or German firm buying in the United States could be subjected to price-fixing from what I understand. What commercial benefit do you expect to achieve by allowing this kind of activity?

Mr. CONNOR. You can postulate these overlaps but we assume that Congress intended the Sherman Act to protect domestic consumers from restraints on import trade and to protect domestic enterprises against restraints on export opportunity.

The focus of the Sherman Act is on the American consumer and the American business enterprise and we should draw the line there basically.

Obviously, we will always have situations where foreign firms are in the United States doing business in the United States, for example, purchasing in the United States, and will have the protection of our laws, whereas to the extent they do business within their own domicile they would not have the protection of those laws. It is just a consequence of——

Mr. RODINO. Do you suggest all of this would help to stimulate trade with foreign customers?

Mr. CONNOR. What we are suggesting, Mr. Chairman, is that it would introduce a degree of certainty that is not there now.

Mr. RODINO. Let me ask this: The primary reason that I sponsored this legislation—and I am sure Mr. McClory feels equally as strongly—is to see our export market expand and see other prospective traders get into the export market and be free of this so-called confusion that exists.

I would like to ask whether or not, considering that is our primary purpose, do you believe that a law that denies foreign purchasers protection of U.S. trade laws would increase the likelihood foreign buyers would buy American goods?

Mr. CONNOR. I am not sure we are denying them protection to start with. I would really have to examine this.

I think what we are proposing is consistent with the general trend that Mr. Atwood described in his comments, the trend toward leaving enforcement of competition policy to the country of the person involved rather than the United States attempting to export its competition policy.

Mr. RODINO. Thank you very much.

Mr. ATWOOD. May I add one comment to what Mr. Connor said on that.

I think foreign purchasers in deciding whether to buy in the United States or some other country are not interested in purchasing lawsuits; they are interested in purchasing goods and services on attractive terms.

Whether they buy here or in Japan or Germany will depend on whether or not U.S. business offers them a good deal.

What this legislation does is to free U.S. business to put together those deals which U.S. business thinks will be profitable and effective in foreign markets.

I think that is the important part of the bill.

Mr. RODINO. Let me ask this one question here.

Mr. Atwood, on page 13 of your written statement you say:

As just described, legislative steps to expand the Webb Act for the possible benefit of a few exporters would create new worries for the large volume of export trade that now operates outside the exemption framework.

In short, I am convinced that legislative expansion of the Webb immunity would intensify rather than alleviate the antitrust concerns of the typical American exporter. H.R. 2326 does not share this substantial drawback.

Having made that statement does this mean that a bill such as H.R. 1648, which expands the Webb-Pomerene Act, is likely to deter the export trade of companies that have operated without employing the Webb immunization process.

Mr. ATWOOD. Yes, Mr. Chairman, that is exactly what I mean. I do think there is a real concern that congressional focus on the Webb exemption would leave behind in the impression of businesses and perhaps even the courts a negative directive, that is, unless you go that route you are fully subject to antitrust with the full array of sanctions.

Most U.S. exporters, the vast majority, are not going to be Webb associations; they are not going to be U.S. trading companies. Most of them are going to be individual operations or agreements between U.S. and foreign firms.

To cast a shadow over that bulk of export trade seems to me a very worrisome step to take. I think we are better off with the H.R. 2326 approach.

Mr. RODINO. Thank you very much.

Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

Taking the chairman's question just one step further, Mr. Connor, what would be the situation under the amendment you propose if the activity involved is in export trade and the injury is inflicted entirely overseas?

How about that kind of domestic activity but with injury abroad? Would we want to exempt such American companies from liability under your amendment?

Mr. CONNOR. We propose that the American company would be liable for the domestic consequences of its action. The American company would be liable for the direct substantial effects within the U.S. economy but we would leave to the laws of other countries the effects outside the United States.

There is one aspect of this that is discussed in our prepared statement that I did not mention in my remarks, that troubles us. We don't have an answer to it and we don't suggest one but we simply raise this as a question.

We are troubled by the fact that the foreign person might in some instances be a foreign subsidiary of a U.S. company. We at least raise the question of whether the American enterprise operating overseas and impacted overseas by the consequences of domestic activity should have no antitrust remedy.

This is a question that we propose. We don't suggest an answer.

Mr. MCCLORY. What about the American export company that buys price-fixed goods, for instance, and exports the goods? Would that kind of injury be exempt?

Mr. CONNOR. He domestically buys price fixed goods? He would have an action domestically under those facts if I understand them.

Mr. McCLORY. I don't think you commented upon the need for a commission to study the entire impact of our antitrust laws.

Mr. CONNOR. No.

Mr. McCLORY. I feel it should be studied with regard to both exports and imports because more and more of our international trade involves our doing business with foreign companies whose practices are quite different from ours, and they sort of get us into a gray area of dangerous trade practices.

Do you think such a commission would be useful and helpful in addition to the Rodino-McClory bill?

Mr. CONNOR. I can't speak for the Business Roundtable on that point but personally and for General Electric we strongly support the notion of a commission.

H.R. 2326 addresses one of very many issues which should properly be explored, in our opinion.

Mr. McCLORY. Mr. Atwood, what, if any, effect do you feel the passage of the Rodino-McClory bill would have on treaties of friendship, commerce, and navigation which we have with other countries?

This is something you would be very knowledgeable about due to your earlier service.

Mr. ATWOOD. I see no inconsistency at all.

Mr. McCLORY. With the amendment that you propose?

Mr. ATWOOD. And with the Roundtable amendment?

Mr. McCLORY. Yes.

Mr. ATWOOD. I see no inconsistency certainly with H.R. 2326 as originally proposed in our treaties of friendship, commerce, and navigation.

There would be no change in access to U.S. courts. There would be a shift or clarification of United States substantive law but certainly our FCN treaties leave within the prerogatives of Congress the ability to change substantive U.S. law.

The answer is no different taking into account the Roundtable proposal subsection (b). It doesn't speak in terms of nationality. It doesn't affect a company's legal rights depending upon whether or not they are United States or foreign, so I don't see any treaty problem there either.

I would be inclined to leave that matter for the courts to work out.

We have, of course, in the law, as Mr. Connor's testimony indicates, some established notions of standing. You are supposed to be in the area of interest intended to be protected before you can bring an antitrust claim.

We do have the *Brunswick* doctrine of the Supreme Court under which damages are not available if the kind of damage you suffered is not the kind of damage the law was intended to prevent.

I think those substantive concepts of standing and antitrust damages are adequate to take care of the problem Mr. Connor perceives and which the Roundtable would suggest be undertaken by legislation.

Mr. McCLORY. With respect to these treaties, perhaps we should put another clause in there or certainly something in the report to the effect that we are not intending to violate any treaties with foreign nations.

Mr. ATWOOD. I think the matter could be adequately dealt with in the report. I think it would be a useful clarification.

Mr. MCCLORY. Mr. Connor, something that concerns me more than anything else that you are stating on behalf of the Roundtable is this sort of dual approach: What you are saying is, we like the Rodino-McClory bill but we also like the Export Trading Company Act and the certification procedure.

Aren't we potentially placing ourselves in difficulty if we have companies getting certificates easily from the Department of Commerce because it is more friendly, or not quite as inhibited or concerned about our antitrust laws as Justice and then having applications for a business review letter held up or denied?

It seems to me we could build chaos into a situation which is relatively orderly now if we adopt this dual approach.

Mr. CONNOR. It is our view that H.R. 2326 addresses a different subject from the Export Trading Company Act. It addresses a much broader subject, that is to say, subject matter jurisdiction under the antitrust laws.

Mr. MCCLORY. It probably would encourage more business review letters.

Mr. CONNOR. It might. Our testimony is simply that we see no inconsistency between the two. H.R. 2326 addresses a very broad range of international transactions.

The Export Trading Company Act solves the problem of the company which wants a higher degree of certainty, which wants certification that what they are proposing to do does not violate the antitrust laws.

We see the trading company approach probably as one that would be availed of by smaller companies rather than larger companies. I doubt my company under any circumstances would take advantage of this sort of procedure.

We have not seen extensive use in the past of business review procedures. We have not seen extensive use of the Webb exemption. This is only a personal opinion, but I don't think we ought to exaggerate the use that would be made of either of these.

Mr. MCCLORY. As a matter of fact, there is no need to apply for the business review letter if the certificate is granted.

I think you also recommend limiting liability to single damages for violations of the antitrust laws.

Mr. CONNOR. This was Mr. Shenefield's proposal you are referring to.

Mr. MCCLORY. Yes.

Mr. CONNOR. I haven't seen it.

Mr. MCCLORY. Various witnesses have recommended that. As a matter of fact, Mr. Baldrige, the Secretary of Commerce, testified that under the Trading Company Act there would be a limit to single damages, whereas under the Rodino-McClory bill he felt there would be the threat of treble damages.

I, for one, want to assure you that we are not trying to build in any treble damage threats so we can amend it to assure that single damages would be recoverable.

Mr. CONNOR. Following a business review procedure?

Mr. MCCLORY. Yes.

Mr. CONNOR. Yes, sir.

Mr. SEIBERLING [presiding]. The time of the gentleman has expired.

Mr. Hughes.

Mr. HUGHES. Thank you, Mr. Chairman.

And welcome, Mr. Atwood and Mr. Connor.

Mr. Atwood, you referred to several common law doctrines which would appear to limit the ability of foreign business. You cite the *Brunswick* case.

My question is don't these common law doctrines provide signficant protection from potential liability and doesn't it provide more flexibility than the approach suggested by your colleague, Mr. Connor, in these amendments?

Mr. ATWOOD. By the Roundtable amendment?

Mr. HUGHES. Yes.

Mr. ATWOOD. I tend to think that is right, that the common law doctrines do give the courts a little more flexibility. As indicated by the exchange between the chairman and Mr. Connor it is often very hard in advance to draw precise lines where a lawsuit ought to be allowed and where it ought not to be allowed.

You need to know a lot about the facts and you need to know more precisely what antitrust claim is being made by whom.

I think the basic doctrines are in the law now, and with the clarification of substance provided by H.R. 2326, the two will mesh quite well to come out very close to what the Roundtable is proposing but perhaps with modifications here and there.

Mr. HUGHES. In the area of comity, in particular trying to determine stock ownership, that is something that would seem to be very difficult to address legislatively.

Mr. ATWOOD. Nationality is a very elusive concept when you are dealing with multinational companies.

Mr. HUGHES. And yet the court, I think, is preliminarily equipped to deal with that issue on a case-by-case basis and it leaves that flexibility.

Mr. ATWOOD. That is my feeling as well. I agree.

Mr. HUGHES. This gives me some concern. If you deny foreign firms relief for injury occurring domestically, what does that portend for Americans trading overseas and protections that might be accorded to Americans by foreign countries?

Mr. ATWOOD. I think the principle of national treatment which is embodied in our FCN treaties and is now emerging in United Nations Code on Restrictive Business Practices is an important one and ought to be kept.

A firm should not be advantaged or disadvantaged on the basis of its nationality alone. This doesn't mean, however, that every foreign purchaser ought to be able to walk into a U.S. court under U.S. law and claim the benefits of U.S. law for effects that were focused abroad. So I would retain the principle of national treatment, I would retain the principle of equal access to the U.S. courts, but I would suggest that the clarification of substantive law is important.

It will serve to disenfranchise some foreign buyers. That is a natural consequence of the amendments, of course.

At the same time, it is not in any way impeding what ever rights they might have under their local law. H.R. 2326, of course, doesn't attempt to tell foreign governments what remedies they might provide where American law does not provide a remedy.

Mr. HUGHES. Does it give you some concern, Mr. Connor, perhaps if we were to accept in principle the concept that foreign firms doing business in this country are injured by domestic experiences might not recover?

The impact that might have on American firms in those foreign countries?

Mr. CONNOR. I would assume, sir, that foreign firms doing business in this country would in most cases have a right to recover under the proposal that we have made. We are not talking here about nationality. We are talking about the location of the person. The foreign firm—to name one of our competitors, Siemens—doing business in the United States as they do, could have a right of recovery under U.S. antitrust laws.

Similarly I would assume American enterprise in a foreign country would expect to have whatever rights a company doing business in that country would have under its competition law.

Mr. HUGHES. I gather from your testimony that you feel the present mechanism to deal with these issues, the flexibility in your present process, is inadequate to address your concerns?

Mr. CONNOR. Yes, sir. What we are asking for basically is a greater degree of certainty.

Mr. Atwood said a moment ago the common law approach would give the courts more flexibility. I think it is a matter of your point of view.

Cases talk, for instance, about a jurisdictional rule of reason as something that is desirable. That is fine if you are a court retrospectively looking back on what happened. If you are a businessman planning a transaction, it is very little comfort to be told that some day a court is going to weigh all of the relevant factors and under an evolving common law doctrine decide the consequences of your actions.

A businessman wants more certainty, and I think that perspective may underline our differences here.

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. SEIBERLING. Mr. Connor, I think with the exception that I will soon indicate I would agree with the comments that you made, but I do have a problem.

On page 8 of your prepared statement, you say that the legislative reforms should achieve three essential purposes. The first is that it should specify that international transactions are not subject to U.S. antitrust jurisdiction except to the extent the conduct has direct substantial and foreseeable effect in the United States by restraining trade in domestic commerce.

Then you have second and third objectives with which I don't have any problem.

I must say I have some problem with this bill insofar as it might be construed to say that as long as U.S. internal trade or commerce, interstate commerce, is the only thing that is affected, the antitrust laws don't reach the activity.

Let's take the *ICI* case. Are you familiar with that case?

Mr. CONNOR. I have been familiar with it. I can't recite it chapter and verse today.

Mr. SEIBERLING. One of the things that the court found to be in violation of the Sherman Act was that ICI and Du Pont had so-called patents and process agreements under which each licensed the other with respect to certain areas.

I forget the specific areas but Du Pont was licensed in the United States and ICI was licensed in Europe under Du Pont's patents.

The court said this was just a device to divide territorial markets. In cases where they couldn't agree which one would have it, they formed joint ventures. CIL in Canada was one. They had one in Brazil, et cetera.

The court said this proved their purpose was to divide up geographical markets worldwide because otherwise they wouldn't have had to worry about what to do in countries where they couldn't decide who should take the business.

As I see it, while that may not have had a direct and substantial and foreseeable effect on commerce in the United States, it certainly inhibited ICI from exporting to the United States and maybe to that extent it did, but it also inhibited Du Pont from exporting to Europe, let us say.

That latter would not be caught if your amendments are adopted. As I understand it, by deleting the provision concerning the effect of excluding a domestic person from trade or commerce with a foreign nation, as you suggest, we would not pick up that aspect of the Du Pont-ICI arrangement. Is that right?

Mr. CONNOR. No, sir.

Mr. Chairman, I believe that the facts of the *ICI* case as you described them would fall squarely under the test which we propose here for H.R. 2326 in that you would clearly be depriving the American consumer of the benefit of imports of ICI products.

I believe that you would find these are direct and substantial effects on the U.S. economy, the exclusion of a significant chemical manufacturer from the U.S. market, the prohibition upon a domestic competitor from export into the U.S. market.

Mr. SEIBERLING. Let's suppose the only agreement was that Du Pont couldn't export to certain countries. Would that be a restraint on trade or commerce within the United States?

Mr. CONNOR. It is certainly not our intention that the result you are apprehensive about would be reached. If the words are inadequate we can address that.

Mr. SEIBERLING. If you take out this last clause of the proposed section 7 of the Sherman Act—and I would agree that it should apply to the other acts—then you have changed the basic impact of this to only domestic commerce and I don't know how you cure that problem, but it seems to me you are going to have to then add restraint of trade or commerce between the States and foreign nations.

You go back to the existing Sherman Act.

Mr. CONNOR. What we are talking about is an adverse effect on the commerce and economy. The facts you have described have that effect. We read the words of section 7(a) as we have revised it to cover that situation. Restraining trade or commerce within the United States would describe an adverse impact on the American economy.

If those words don't do that, then we have erred.

Mr. SEIBERLING. All I can say is if I were a judge trying to figure out what Congress intended to do here by using different language from the Sherman Act and saying nothing about commerce with foreign nations, I would assume that Congress did not mean that to apply.

I would think that as long as the only restraint was export trade, it could be very substantial and very direct and foreseeable and it still wouldn't be caught.

Mr. CONNOR. The premise of this whole discussion, sir, is that we begin by saying nothing in this act shall apply to trade or commerce with foreign nations, unless the conduct restrains trade or commerce within the United States, that is to say, unless the conduct involving foreign commerce has a negative impact on the U.S. economy.

Mr. SEIBERLING. I understand what you are saying but I don't think that is what the revised statute would say.

Mr. CONNOR. I don't think we have any disagreement. Our concern with the language that we deleted was that it seemed to go too far.

Mr. SEIBERLING. I think you made a good point but I think in your proposed change now you have gone too far in the other direction.

I am trying to figure out if there is some solution.

I think clearly your second and third articulations of what the goals should be are correct. We shouldn't be liable to foreign purchasers as long as our conduct does not violate their laws and substantially restrain U.S. trade and commerce. We certainly shouldn't have liability to the Justice Department or other governmental action by the United States if our activity doesn't affect U.S. trade and commerce.

But I do have some concern about having a substantial effect on U.S. foreign commerce in the sense of exports, and I think we have to take care of that situation.

Mr. Atwood, do you have any response to this point?

Mr. ATWOOD. I thought the original language handled it all right. The language "substantially affects trade or commerce in the United States," seems to me clearly would pick up an import restraint because an import restraint would adversely affect internal trade since an importer is not a participant in the U.S. market.

I understand Mr. Connor's concern about the word "affect" as possibly picking up positive as well as negative effects where effect for jurisdictional purposes was defined as meaning an adverse effect on the competitive process and not a beneficial effect.

You might be able to incorporate through the legislative history some of the jurisdictional decisions which have defined effect in a sensible way.

Mr. SEIBERLING. What is the matter with the word "restraint," a word that has long been interpreted within the law and everybody understands what it means?

Mr. ATWOOD. But then you get into the problem you suggested, and I am sure this can be solved as well where the restraint is really abroad but the effect is domestic.

It is really the effect that ought to trigger the statute, not the location of the restraint and not whether the restraint affects domestic or import commerce.

Mr. SEIBERLING. But if the restraint is abroad and affects exports, then it is also a restraint that is operative here, is it not? Restraint and foreign commerce with that foreign nation?

Mr. ATWOOD. Yes, I was focusing on import restraints.

Mr. SEIBERLING. If it is an import restraint that has an effect on U.S. commerce internally?

Mr. ATWOOD. Right.

Mr. SEIBERLING. An export restraint then, even though the restraint doesn't take effect until you get to country X, is a restraint on shipping to country X from the United States.

Mr. ATWOOD. Yes, but it doesn't have a negative effect on trade in the United States. The negative effect really is upon the foreign market.

Mr. SEIBERLING. But it is a restraint on trade and commerce with the foreign nation. That is the way the Sherman Act is phrased and I don't know why we need to abandon that phraseology.

Mr. ATWOOD. What the legislation is trying to do is remind the courts that not all export restraints are damaging to American interests. Export restraints are only damaging to American interests if there are spillover effects within the United States or if U.S. competitors are foreclosed against their will from participating in trade.

If it doesn't have those indicia then the effect is really felt abroad even though there is in some sense a restraint. That is why I tilt toward the effect language rather than restraint.

I think we all agree in substance here.

Mr. SEIBERLING. We all agree with the formulation you just made? Do you agree with that, Mr. Connor?

Mr. CONNOR. Yes, I do.

Mr. SEIBERLING. I don't see any difference, then, in viewpoint here. It is merely a matter of how we phrase this so as to make our meaning clear.

Mr. ATWOOD. That is right.

Mr. SEIBERLING. I have no further questions.

Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

I have no questions. I just arrived having consumed my morning in another subcommittee hearing but I did want to evidence interest in this important subject so my presence does that if nothing else.

Mr. SEIBERLING. Thank you.

Gentlemen, we would probably like to reserve the privilege of submitting some questions in writing in case some people have further thoughts and I hope you will be willing to try to answer them and do it within a reasonable time.

Thank you very much.

There being no further questions, we now adjourn.

[Whereupon, at 11:30 a.m., the subcommittee was adjourned.]

FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

WEDNESDAY, JUNE 24, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:40 a.m., in room 2237, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. (chairman) presiding.

Present: Representatives Rodino, Hughes, Evans, Butler, and Railsback.

Staff present: Warren S. Grimes, counsel; George E. Garvey, assistant counsel; and Franklin G. Polk, and Charles E. Kern, II, associate counsel; Dorothy C. Wadley, clerk.

Mr. RODINO. The committee will come to order.

Today, we are holding a third hearing on H.R. 2326, the Foreign Trade Antitrust Improvements Act.

At the two prior hearings there was significant testimony from antitrust experts regarding the breadth of the extraterritorial reach of U.S. antitrust laws.

Most of the witnesses believed that some action should be taken to clarify the applicability of our antitrust laws to Americans engaged in foreign commerce. H.R. 2326 is intended to achieve that goal.

There was some concern that H.R. 2326, while it does clarify the underlying statute, does not provide adequate certainty regarding the applicability of these laws to specific activities.

Secretary of Commerce Malcolm Baldrige stated the certification process that the Export Trading Company Act, H.R. 1648, would establish provides this added certainty.

Other witnesses, however, believed that H.R. 1648 would create such a complex regulatory bureaucracy that small- and medium-sized businesses would actually be deterred from exporting.

John Shenefield and Prof. Eleanor Fox testified that greater certainty could be achieved if the business review procedure currently administered by the Department of Justice was given some binding effect.

There is some merit to that suggestion and Mr. McClory and I have had the subcommittee staff prepare a draft of a possible amendment to H.R. 2326 that would effectively codify the business review procedure.

Under this proposal, a favorable review by the Attorney General would provide protection against subsequent Government action and limit recovery in a private suit to actual, but not treble, damages.

Today's testimony will focus largely on the procedural aspects of the Export Trading Company Act as it passed the Senate—S. 734—and the draft amendment to H.R. 2326.

Our witnesses are not antitrust experts but either are experienced in the problems of Federal regulation or have been actively involved in export trading.

I believe it is important to understand the perceptions of businessmen actually involved in the trade these bills are intended to promote.

Businessmen may object to the perceived uncertainty of the antitrust laws but that does not mean the price they will pay for greater certainty is limitless.

A regulatory process that would impose a substantial financial burden on potential exporters and unduly interfere with their right to act free of Government control may be just as onerous as is the uncertain application of the antitrust laws.

Today's testimony should help us enact legislation that removes needless uncertainty without imposing excessive bureaucratic control or jeopardizing domestic antitrust enforcement.

I would like to remind our subcommittee and the witnesses that we have heard time and again about the enormous costs of unnecessary bureaucracy, and the tremendous delay in expenditure of time in trying to go through the bureaucratic process.

I think if there is anything that this administration seems to address it is that there has been a great deal of bureaucracy and that this has involved us in a great deal of unnecessary expenditure and unnecessary delay and frustration.

I think that is one of the things that H.R. 2326 was aimed at, and I would hope you would bear that in mind.

Our three witnesses will appear in a panel. One of our witnesses, Thomas Rees, is a former colleague and dear friend. He served for 11 years as a Member of the House of Representatives from the State of California and, while in Congress, dealt largely with international finance and monetary affairs.

Prior to his election to Congress, Mr. Rees founded and operated an export trading company that exported farm and transportation machinery to Mexico.

Since leaving Congress he has practiced law, primarily in the area of international trade, and has also formed a new trading company, and I hope that he is successful with it and can give us the benefit of his practical experience in this area.

Mr. Gordon Johnson is the chairman of the board of LogEtronics, Inc. LogEtronics' main office is located in Springfield, Va. It was established in 1954 and is in the business of engineering, manufacturing, and marketing improved technology products for graphic communications.

It now employs 380 people and is operating throughout the world.

Our third witness is Mr. Fred Emery, a consultant specializing in Federal regulatory problems. Mr. Emery was Director of the Federal Register from 1970 to 1979. Prior to that he served as Deputy Assistant General Counsel for Regulation at the Department of Transportation.

He will compare the regulatory aspects of the Senate Export Trading Company bill, S. 734, with the provisions of the draft amendment to H.R. 2326.

We welcome you gentlemen.

TESTIMONY OF HON. THOMAS M. REES, ATTORNEY AND BUSINESSMAN, AND FORMER MEMBER OF CONGRESS; GORDON JOHNSON, CHAIRMAN OF THE BOARD, LOGETRONICS, INC., SPRINGFIELD, VA.; AND FRED EMERY, INDEPENDENT CONSULTANT ON REGULATORY MATTERS

Mr. RODINO. Mr. Butler.

Mr. BUTLER. I have no opening statement.

Mr. RODINO. With that I would like to invite each of you to make your statements. We will include your written statements in their entirety in the record. If you would summarize, we would appreciate that so we can then get to the questioning.

Mr. Rees.

Mr. REES. Thank you. It is a pleasure to be with you here today.

I very much appreciate the opportunity of talking before the committee. This is a subject with which I am most familiar. I dealt with it when I was a Member of the House and chairman of the Banking Subcommittee on International Trade Investment and Montary Policy.

After I left Congress, I began practicing law here in Washington and also in California.

Two years ago, President Carter appointed me to head up the Task Force for Small Business and International Trade which was part of the White House Conference on Small Business. The group consisted of approximately 12 participants, all classified as small businesses.

The criteria looked at were companies listed under the Fortune 1,000. That meant we looked into the fairly large establishment-type businesses. However, I felt it was the medium-sized businesses that really represented export potential in the United States. This is most certainly true, not only in my native California, but also in the District of Columbia area, particularly in northern Virginia and Rockville, Md.

While heading up the task force, one recommendation made was to have the Webb-Pomerene Act clarified and expanded. Another recommendation was to try and develop the idea of an American export trading company. A number of ideas were attached to that concept such as budgetary restraints, clarification of DISC corporations and extra draw on the Eximbank. Due primarily to budgetary problems, they were dropped from the bill.

I feel that the current Senate provisions won't do anything except to confuse the businessman. As an attorney dealing with the small- and medium-sized business, I have learned that many businesses choose to ignore export possibilities because of all the complications involved. The businesses are afraid of the Foreign Corrupt Practices Act, but not because the business intends to be corrupt, but because there are no guidelines for U.S. businesses to follow and the overall arrogance of the two agencies which have jurisdiction over them.

I recently talked with a friend of mine who is on the board of directors of several corporations. He said of those corporations, that three of them have chosen to not transact any business because of internal guidelines involved.

For example, in Santa Clara County, Calif., small- and medium-sized high technical companies are not taking advantage of DISC because it is so complex; the IRS does not like DISC and they are almost sure to audit, if the company is operating under the DISC arrangement. In my many dealings with tax work, I have found this condition time after time. It doesn't seem to matter how many times a decision is made by the Tax Court—if the IRS doesn't like the ruling, they just keep litigating. If you'd like to get into that subject matter, I would be glad to testify at length.

Using the latest figure available to me which was in 1976, Webb-Pomerene associations participated in about $1.725 billion in trade. It can't be said if that a Webb-Pomerene association did not exist, no one would have participated. Most likely they would have. But, the figure represents 1.5 percent of the total trade in that year which was $114 billion.

There are only about 25 to 30 Webb-Pomerene associations in existence today. They are primarily concentrated in agricultural commodities. There are about six associations in California dealing with dried fruits, et cetera. There are also three dealing with the motion picture industry. I suspect they could all operate without the Webb-Pomerene Act, but they are Webb-Pomerene associations. They form groups, for example, to negotiate shipping rates and shipping councils. They also try to develop standard contracts throughout the industry, plus developing a cross industry grading.

I am currently dealing with dried fruit exports to the Philippines. It is so complex because of the grading standards. We have to deal with these standards in order to deal with our shipping orders. They are also involved in market research, including a certain amount of cooperative bidding which isn't talked about too much.

It is hard to understand why there has been so much discussion on the Webb-Pomerene Act amendments. Traditionally, Justice Department has been opposed to the act and any kind of amendment. I doubt if the act has been amended for the last 20 years. Things certainly have changed since 1916 when the act was originally promulgated. The act doesn't deal with the export realities of the year 1981. In fact, it doesn't deal with the export realities of the years 1951, 1961, and 1971. It just sits there.

While chairing the task force to coordinate this legislation. I watched how people would spend hours nitpicking little things they said would have to happen if someone decided to join a Webb-Pomerene association. Examining the bill, I was shocked to find that it represents a Sword of Damocles hanging over a small-medium businessman's head. The businessman will simply not deal with it.

There are certain definitions in the bill. For example, section 2 of the Senate bill states an association must have for its sole purpose—export trade.

We are talking about export-trading companies, not Webb-Pomerene associations. In reading the bill, it seems to interchange export-trading companies and the phrase Webb-Pomerene associations. If you are looking at an export-trading company, you might find that you will have to import in that particular company.

I am currently working on a project to export duck plucking machinery to Thailand. We signed a contract with a company that uses down for camping equipment in the United States. If we export the machinery, we will be importing down. I guess if we were qualified under this act, we would lose our certification because we were importing goods.

Take a look at major trading companies such as Mitsubishi. They export as well as import. They probably do as much importation as exportation in certain cases. I suspect you will find Japanese trading companies located throughout the United States looking for goods to import because they are afraid if they tip the scales, Congress and the administration will be discriminatory against their businesses.

Section 66 prohibits the export of patents and technology except when incidental to general export transaction. I don't know what that means. Many lesser developed and developing countries want to import technology. They no longer want to be colonialist countries that simply supply raw materials.

I am also active in dealings with Mexico. They have expressed a great interest in technology. They also have a withholding tax on goods produced in the United States and exported to Mexico. a 40-percent withholding tax is charged so they can impress importers how they would like the product to have a Mexican origin in technology and engineering. This is being done on a large copper project.

As you can see, whoever wrote this, doesn't understand too well how business operates.

The certification section on page 28 of the bill is something else. For example, let's assume this is an export company with six employees, the name of the association, location of the offices, the names of all the officers and stockholders. I suspect if they want to qualify under this act, all names would have to be listed.

"A copy of the certificate or articles of incorporation and bylaws.

"A description of the goods, wares, merchandise, or services which the association or export-trading company or their members export or propose to export.

"A description of the domestic and international conditions, circumstances, and factors"—this is something else—"which show that the association or export-trading company and its activities will serve a specified need in promoting the export trade"—isn't this kind of sophomoric?—"of the described goods, wares, merchandise, or services.

"The export trade activities in which the association or export trading company intends to engage and the methods.

"The names of all countries where export trade in the described goods, wares, merchandise, or services is conducted or proposed to be conducted by or through the association or export-trading company."

I don't understand how this last statement applies. How could you possibly know tomorrow what countries you will be exporting to? One reads the whole certification process and thinks, "I am going to deal specifically with Asia"—then you receive an order from Peru to buy a piece of machinery. Does the whole certification process have to be repeated? Do you have to have it just sit there for 90 days? Do you let Justice and the FTC interfere with it for 45 days? If you do, you'll lose the deal.

I started looking into the certification process. I put these on paper to get an ideal. One, you put in your application. There must be a decision within 90 days. However, once Commerce has made its preliminary decision, it turns the project over to the FTC and Justice Departments. They will in turn notify back to Commerce of their decision and advice. At this point Commerce will give you this intent. After 45 days, you must be told whether they disagree or if they are just going to offer advice.

The act is ambiguous in terms of where this 45-day period goes. Does it go at the end of the 90-day period? Does it come internally within the 90-day period that Justice has? No one seems to know. If the Attorney General or the Federal Trade Commission disagrees on the certification, then there is another 30-day delay.

Totalled, you are approaching a 1-year delay caused by bureaucratic morass simply because some company is trying to receive certification.

If you are an export trading company dealing with Asia and dealing in food machinery, and you decide to prospect in another line of machinery or in another part of the world, I think you would need an amended certificate. Frankly, I think this is ridiculous, especially if you want something to work.

This bill deals with export trading companies. When Senator Stevenson introduced it last year and when Senator Heinz introduced it this year, it should have contained language that we emulate trading companies that exist in most countries of the world today. We don't have many in the United States. We don't have to be ashamed because we don't have big export trading companies. The country has been blessed with natural resources and fortunately, we haven't had to export to others the way Denmark or Japan and others have. Therefore, we want to facilitate the export trade.

I think the only way to facilitate export trade is to have the type of procedure that you have in your subcommittee print. Export trade is exempted and that does not impact the domestic economy. In comparison, it is like a corporate merger—ask the IRS for an opinion—6 months later you'll receive it. If you seek that type of advisory opinion to protect yourself, then Justice should be consulted.

Export companies are small in this country. They are not big corporations. I had an export company that had three employees. They couldn't spend all their time before the Federal district court fighting the Department of Justice over a certificate Commerce issued them after a hearing that lasted 6 months. As a result, they wouldn't be involved.

If there is a problem they can conceive, they will say—"I will not export—I will not do business under those circumstances."

The Senate bill was not written by people in the export trade. It was written by bureaucrats with three different bureaus of Government, each trying to keep a handle on something.

I think your approach is the only approach because you are sure, the businessman is sure. I would urge that you substitute the Senate language for your language and send the bill to the full committee.

[Statement of Mr. Rees follows:]

STATEMENT OF THOMAS M. REES, ESQUIRE

Members of the Committee, my name is Thomas M. Rees. I am an attorney practicing law in Washington, D.C. and in California. I appreciate the opportunity of testifying before your sub-committee today on proposed legislation affecting the antitrust status of export transactions. I come before your committee representing my own views and I'm not representing a client on this matter. Prior to becoming an attorney, I was an exporter in California and had my own firm, Compania del Pacifico which specialized in exporting farm machinery to Mexico.

While I practice law in California and in the District, I have a continuing interest in export trade and last year, with several colleagues, I started an export trading company, AITG, Inc. We are currently working on several projects in Asia, some of them in anticipation of the passage of the Trading Company Act. I might also wear another hat. Two years ago, I was appointed by President Carter to head-up a Task Force on Small Business and International Trade. This is one of the several task forces which worked with the White House Conference on Small Business. My views on the Webb-Pomerene Act, I believe reflect the views of our panel.

I'm not going to go into the background of the Webb-Pomerene Act at this time. I must note though, that there is intense interest on an Act, which frankly, in the past has not done much to stimulate U.S. exports. In a recent report of the Federal Trade Commission, it was estimated that the Webb-Pomerene Associations participated in about 1.725 billion dollars of trade in 1976. Compare this to our total exports in that year of 114 billion dollars and we see that the Webb-Pomerene Associations only provided 1.5% of total exports. I would suggest today that there are probably from 25-30 active associations. Each of them having their own approach to the Act and the functions they believe they can engage in under the Act. Today, Associations are used for negotiation of shipping rates and the formation of shipper's councils, developing standards contracts and product grading criteria, exchanging buyer-offer information, market research, cooperative bidding and the utilization of the central sales agent.

In looking over the list of Associations, they seem to be concentrated in the field of agriculture. My own state of California has at least a half dozen associations dealing with agriculture and also several associations dealing with the motion picture industry. Those that have been together for many years are the ones that tend to more fully utilize their associations.

In looking at all the intrigue involved in attempting to amend the Webb-Pomerene Act over the past two or three years, it's hard to understand why there is so much concern over an Act which has not been very effective. I was rather appalled at the complexity of the Senate amendments to S-734 and I frankly, believe that most small to medium businesses would foresake the Webb-Pomerene Act under these circumstances because of this complexity. I believe that one of the major reasons the Webb-Pomerene Act has not been utilized is that there are two separate Federal agencies currently dealing with the Act—The Federal Trade Commission and the Attorney General. Neither agency seems to agree with each other and neither one of them seems to discuss the matter with the Department of Commerce, which supposedly has jurisdiction over international trade.

If there is one thing a small to medium sized businessman does not want, it is the "sword of Damocles" of unclear government regulation over their heads. Businessmen prefer definite laws which adequately outline what their conduct can or cannot be. Unfortunately, in the field of foreign trade, too many of the laws affecting trade are very ambiguous and with a constant fear of government interference or prosecution, acts are not utilized. I would mention the Webb-Pomerence Act, Foreign Corrupt Practices Act and the DISC Corporation.

If I were advising a small to medium sized business, or group of businesses wishing to utilize the Webb-Pomerene Act under the provisions of S-734, I would probably advise them not to use the Act. It is ambiguous regards the relationship between the Department of Commerce, the Attorney General and the Federal Trade Commission. Supposedly, the Act gives to Commerce the right to approve an application within ninety days. But, there is a layover period of 45 days, when either the Federal Trade Commission or the Attorney General can give advice or disagreement on a pending application. Under the Act, from the time the application is submitted, the applicant could wait up to 120 days for a definite answer. Even if Commerce approved the application, and disapproved the comments of the Federal Trade Commission or the Attorney General, there is always the problem that the Attorney General could come in after the businessmen had received the certificate and file suit in federal court.

It's been my impression that the Attorney General has not liked the Webb-Pomerene Act and is consistently opposed to any amendments, no matter how trivial to the Act. When you have an agency with a predisposed prejudice against a law and then give that agency the power to deal with that law, it means that the businessman is sitting squarely behind the eight ball.

The Senate bill is ambiguous in terms of its emphasis on export trade. This bothers me in light of Title I of the bill which creates export trading companies. A trading company might not be an association. A trading company might wish to have a joint venture with several banks, foreign and domestic, but that part of their activities might include import as well as export, although export would be the dominating activity. In Section 2, the eligibility section, the association has to have for its "sole purpose-export trade". There is also Section 6 which prohibits the export of patents and technology except when "incidental to a general export transaction". Later on in the certification section, it requires a rather extensive laundry list of what the proposed association plans to do. Again, it is very difficult in a complex export transaction to foresee exactly what an association might wish to do and again, there is the constant problem of a changing in nature of the business transaction forcing the holder of the certificate to go back to Commerce for an amendment.

I would predict that if S-734 is approved by the House in its present form and signed into law, that there will be very little motivation for business to form a Webb-Pomerene Association.

I have read the House Judiciary Committee draft of their version of Title II. I like this approach. It ties more closely into the concept of export trading companies. Export activities which do not interfere with domestic commerce are exempted from the Sherman and the Clayton Act. If a businessman wanting to make sure that the transaction is exempt wishes, he can file for a certificate of review of the Attorney General. The Attorney General then has 60 days to issue the certificate or to disapprove the transaction. This is a far cleaner approach. It assumes that anti-trust laws do not affect export transactions, not just transaction or Webb-Pomerene Associations. Therefore, it would mean that an export trading company wishing to engage in a rather sophisticated project, such as a combination of several bank participation with one or more foreign trading companies participation, could do so. If the trading company wanted to have a definite ruling from the Attorney General, they could also do so. It would be very analogous to ask the Internal Revenue Service for a letter of ruling on a proposed corporate merger, for example.

The Committee's print will take away the doubt that exists in any businessman's mind on a complex international transaction. As long as there is doubt, the entrepreneur is going to be very reluctant to go into a transaction. It is doubt, I feel that is continually inhibited in export transactions.

I'm personally interested in the export trading company legislation. It was legislation that we helped develop in our Small Business and International Trade Task Force. I am currently working with several associates in developing a concept of United States Regional Banks joint venturing with Foreign Regional Banks and active export trading companies both here and abroad. These joint ventures, we hope, would act as trading companies backed up by expertise overseas and in the United States both in trade and in finance. We need this type of sophisticated approach in developing a trading company because frankly, this country does not have that expertise. When these combinations start coming together, there is always the fear of anti-trust law violations. Since the Webb-Pomerene Act was originally promulgated, most major trading companies or groupings such as the common market have developed their own strong antitrust laws and precidents.

Once an entrepreneur feels that he need not worry about the long-arm of country A in determining what a national can do in country B, then the way will be cleared to making the export trading company act a vital and creative act in developing a greater and more sophisticated export base in the United States.

Thank you for your Committee's efforts on behalf of foreign trade in the U.S.

Mr. RODINO. Thank you very much.
Mr. Johnson.

TESTIMONY OF GORDON JOHNSON

Mr. JOHNSON. Thank you, Mr. Chairman and members of the committee.

For me in my 26 years in business this is my first opportunity to do what I am told businessmen should do more often, and that is, come out of hiding and express their views.

My name is Gordon Johnson. I am chairman of LogEtronics, Inc. in Springfield, Va., a company which I helped found in 1955, a manufacturing business, last year selling equipment to customers in 70 countries around the world, primarily in the printing industry, also in hospitals and aerial photography. Last year, 40 cents out of every sales dollar came from a customer outside the United States. We built our sales from $14 million in 1976 to, last year, $30 million. So that 40 percent has actually been increasing our percentage of foreign sales as we go. We received a Presidential E award for export promotion 2 years ago and we are very proud to fly that flag outside each day.

I am here today speaking as a businessman. My views are my own. Although I do serve on the U.S. Chamber of Commerce Export Policy Task Force and am chairman of the Task Force Small Business Working Group. I want to be sure it is clear my views are my own, and not necessarily those of the U.S. Chamber.

I have read Senate bill S. 734. I have also read the proposed staff draft amendment to H.R. 2326 on the same subject.

As I understand the two bills, the big difference concerns a certificate for exemption from antitrust prosecution which would be mandatory under S. 734 but optional under H.R. 2326.

As I read the staff draft, it seems to me that the difference making it an optional procedure rather than a required procedure, is important to the freedom of the businessman in coming into this activity.

Some of the trade associations that are set up by the big banks or large corporations may well have legal staff to cope with what I read in S. 734 but when you come to the kind of trade associations that are described in title II, these are, as Tom was saying, more like cooperatives, they will be more local, more regional, the kind of operation that will not have and could not afford large legal staffs.

Their income will be very limited because they will be adding their costs on top of the businessman and they are not going to have a lot of money for fringe activities other than trying to fulfill their basic mission to sell more goods overseas.

My real concern is that the certification procedures both as to information required and the administrative findings are going to be very complex.

Mr. RODINO. Mr. Johnson, unfortunately, we have to go to the floor for a recorded vote. We will be back in 15 minutes.

[Recess.]

Mr. RODINO. The committee will come to order.

Mr. Johnson, you may resume. Sorry for the interruption.

Mr. JOHNSON. Just to pick up where I left off, my concern over this certification procedure comes from the fact that the problem for small- and medium-size business in exporting is what I call the very high hassle factor that faces one who wants to sell his goods overseas in foreign markets.

I won't go into the list of obstacles but they are there in procedures, in documentation, in currencies and in a whole lot of Government laws and regulations that seem to have cropped up to protect someone from something.

Frankly, the certification procedure outlined in 734 appears designed more to keep lawyers employed than to encourage exports as I read it. Rather than obstacles and disincentives we need to look for incentives if we want to increase exports.

The need for increased exports extends beyond the simple balance of payments question that occupies most of our attention and the preamble to these acts.

I am concerned that in our rush to strengthen our military strength overseas we are forgetting about the importance of our economic presence. Our economic presence may be more important in the long run than the military.

I say that because while we talk a lot about productivity and reindustrialization, we forget about the importance of the overseas market as a key to improving our productivity.

Productivity goes up with increased volume. If we abdicate the foreign market to foreign competitors, they will get the productivity benefits of increased volume of sales over there and they are going to invade our market with lower cost goods because they built up their base in these foreign markets.

If we allow that to happen then I think we weaken our own industrial base and if we do that we weaken our national security.

We have a lot of talk about balance of payments but it is important to our military strength and our military security that we maintain this overseas presence.

Small business is important in that presence—small and medium business. This is where most of innovation comes in this country, where most of the jobs are in this country, and I just feel that a complicated certification process will be a disincentive, just throwing in another of the many obstacles already in place for a business trying to move beyond the convenient, comfortable domestic marketplace into export markets.

I am not skilled in the workings of the legislative process but if the process of simplifying the Senate bill would in effect prevent passage of any bill at all, then I do feel we should go with half a loaf rather than none at all.

I appreciate your concern for simplifying the certification procedure. I am in favor of the basic export trading company bill with a minimum of redtape and obstacles for small business participation.

That summarizes my statement.

[The statement follows:]

STATEMENT BY GORDON O. F. JOHNSON, CHAIRMAN, LOGETRONICS, INC.

My name is Gordon Johnson. I am Chairman of LogEtronics, Inc. in Springfield, Virginia, a company which I helped found in 1955 to manufacture equipment for improved photographic reproduction processes in aerial photography, medical radiography and the printing industry, particularly offset printing. We currently employ 384 people in the U.S. and in Europe. Over the past five years we increased our sales from $14 million in 1976 to $30 million in 1980. Last year, 40¢ out of every sales dollar came from a customer outside the United States, and we shipped equipment to 70 countries around the world. In 1979, we received the U.S. Presidential "E" Award for Export Expansion; we were only the 16th firm in Virginia to receive this award since the program began in 1961.

I am here today speaking as a businessman. My views are my own. I serve on several U.S. Chamber groups, including chairmanship of the Small Business Working Group of the Chamber's Export Policy Task Force, but what I say here should in no way be taken as representing the views of the Chamber.

I have read Senate bill S. 734, with particular attention to Title II on Export Trade Associations and Section 2 Exemption From Antitrust Laws. I have also read a proposed staff draft amendment to H.R. 2326 on the same subject.

As I understand the two bills, the big difference concerns a certificate for exemption from antitrust prosecution which would be mandatory under S. 734 but optional under H.R. 2326. For large corporations or banks, which can be expected to build up a network of subsidiaries and agents, this certification procedure may indeed be necessary and appropriate. At least these concerns have sufficient legal staff already to be able to cope with it.

With respect to the trade associations described in Title II, however, I understand these will be more like cooperatives, made up of small and medium size businesses organized at the local or state level in conjunction with local or regional banks and regional or state industrial development agencies. For these companies and associations, legal expertise will be much more limited and the likelihood of anti-trust violation would seem to be very small. I believe these cooperative associations or federations offer a more attractive vehicle for small business than the bank dominated export trading companies envisaged in Title I of the Act.

My real concern is that the required certification procedure set forth in S. 734, both as to information required in the application and as to the administrative findings required to establish need and 5 findings on what the trading company does not do, involving three separate government departments, is so complicated that it will serve more as a barrier than an incentive so far as small business participation is concerned.

The proposed staff draft amendment to H.R. 2326 appears much simpler, more straight forward, and more understandable.

If the purpose of this act is indeed to increase exports and also to bring more small business into the export trade arena, then we must find ways to simplify the process, not complicate it.

The basic obstacle to exporting for most small businesses is that it is more complicated than domestic business in the U.S. There is a very high "hassle factor" associated with exporting—and some of that hassle factor is created by our own government in its various rules and regulations, such as DISC legislation, export licensing, anti boycott legislation, and the Foreign Corrupt Practices Act—all of which add complexity over and above the complexity of export documentation, currency exchange rates, special packing and shipping, extended financing, and special terms and methods of payment—plus the extra complexity of installation, instruction, and after sale service in a foreign country with different laws, electrical and other codes, languages and mores.

Frankly speaking, the certification procedure outlined in S. 734 appears designed more to keep lawyers employed than to encourage exports.

Rather than obstacles and disincentives for small business we need to look for incentives. I personally doubt that small businesses in general will rush to use export trading companies. Nevertheless, I would hope that the new law should try to minimize the obstacles.

Our national need to export extends beyond the simple balance of payments question which occupies most of our attention today, and is referred to in the preamble to this act. We must recognize that U.S. strength in world trade and in world markets may well be more important to our long run national security than our current military strength.

We talk a lot about productivity and reindustrialization. One of the keys to increased productivity is increased volume of production. If I produce more, I will lower my unit production cost. World market share is essential if this country is to build volume productivity in the future, and keep ourselves competitive with foreign firms. We cannot abdicate world markets and the U.S. market to foreign competitors. If we allow foreign competitors to build market share in world markets outside the U.S., it is then only a matter of time before they use their increased productivity and consequent lower costs to invade U.S. markets and weaken our own industrial base. A weakened industrial base cannot support a strong military defense.

We need incentives, not disincentives for small business to enter into world trade. A complicated certification process will be a disincentive, joining a number of others already in place. I sincerely hope that, at least for small and medium size businesses, this certification process can be significantly simplified from what is described in S. 734.

One final note: I am not skilled in the workings of the legislative process. If the process of simplifying the Senate Bill were to prevent passage of any Bill at all, however, I would be the first to say let's put up with the complexity rather than have nothing at all.

Mr. RODINO. Thank you very much, Mr. Johnson.

Mr. Emery.

Mr. EMERY. Thank you, Mr. Chairman. My name is Fred Emery. I am not in any way an expert in antitrust law. I was asked to look at the staff draft and compare it with S. 734 based on my experience of about 20 years in State and Federal regulatory activities.

I will summarize what I have said in my prepared statement as the chairman requested. Basically, I think the intent of the two proposals is the same. The intent is to exempt export trade activities from the normal application of the antitrust laws provided that in giving that exemption there is not an exemption given for domestic activities that would still be considered violations of the antitrust laws.

The difference between the two drafts is that the staff draft amounts to a decision by the Congress to put that exemption right up front. A company that might wish to get involved in export trade activity is given the exemption by an amendment to the basic organic antitrust statutes.

Having received the exemption from the statute, a company that has internally or externally available expert counsel can make the decision that all of the requisite conditions are there, that the exemption applies, that there will be no risk in violating antitrust laws domestically, and can proceed with whatever kinds of operations that are involved.

So that some of the concerns Mr. Rees and Mr. Johnson have mentioned do not exist with respect to the staff draft because the exemption is given by the Congress by amendment to the basic law.

The other provision in the staff draft is, as Mr. Rees described it, basically there for companies that feel they don't have in-house counsel or don't have the financial resources—not enough money involved in export activity—to hire expert counsel to do the necessary kind of antitrust evaluation.

Then they have the opportunity to come to the Justice Department and getting an advisory opinion but one that carries certain protections from suit by the Government later and to some extent protection from civil suit by eliminating treble damages. That is an option.

The difference between that and the Senate bill as it was passed is really fundamental because the Senate bill as has been described creates a regulatory process. There are certain exemptions from the Administrative Procedures Act requirements, but what really matters is that the Congress is saying in the Senate bill "we are not granting the exemption, we are delegating to one Federal agency, with a certain involvement of two others, the authority to issue the exemption." The minute that happens, all of the normal administrative process requirements come in; there is no way you can get around it once you start down that road.

The Commerce Department will have to have regulations; there would have to be an administrative process. If somebody applies for the exemption, as has been indicated earlier, there are at least six requirements in the bill itself. Three of these are basically the conditions that involve making sure that you do not do something that creates a domestic problem; but the other three have nothing to do with antitrust laws.

They are additional conditions you would have to meet. Each of these is subject to interpretation and certainly you can envision a battery of regulations over the years explaining what they mean.

The difference between the two versions amounts to a difference between an exemption granted by the Congress and an exemption granted by a Federal agency under delegation of authority from the Congress.

I am suggesting that the Commerce Department, with probably prodding from FTC and Justice, would eventually build up a fairly complex administrative process and a fairly complex set of regulations.

I am not suggesting they will do anything wrong; what I am saying is that once you start down that road, it is almost inevitable.

Let me give you one example. Probably the simplest regulation that I think I have seen in a number of years was the one CAB put out prohibiting the smoking of pipes and cigars on airlines and permitting the smoking of cigarettes only if you sat in a smoking section.

The regulation entitled all of us who are nonsmokers or ex-smokers to insist on a nonsmoking seat.

The regulation worked fairly well until one day out here at National a man got on the plane at the last minute and insisted on his nonsmoking seat. There were none left.

Because of the fuss the pilot landed the airplane after they had taken off before reaching their destination.

CAB went back to the drawing board and said, well, maybe we ought to put out a regulation that says unless you arrive at least 5 minutes before takeoff time you are not entitled to a nonsmoking seat.

Somebody came in and said, "Well, wait a minute, suppose the reason I arrive less than 5 minutes before takeoff time is because I came in on a connecting flight, and it is the same airline, and it is not my fault."

You can see what happens. Eventually the CAB threw up its hands and decided, maybe we ought to get out of the business of regulating smoking on airlines.

That is an exaggerated type of example but it shows what you get into if you take the regulatory approach. Really the choice you have here is "do we take the regulatory approach or do we just amend the organic statute and in addition provide some sort of service to the business community that doesn't feel it has in-house counsel to provide the answers themselves."

[Testimony of Fred Emery follows:]

TESTIMONY OF FRED EMERY

My name is Fred Emery. I am a consultant specializing in Federal regulatory problems. From 1970 to 1979 I served as Director of the Federal Register (1970-1979) and before that as Deputy Assistant General Counsel for Regulation, U.S. Department of Transportation (1968-1970).

I am not an expert in antitrust law and it is not my purpose or intent to testify either as to the desirability of the legislation before this committee or the antitrust implications of that legislation.

Rather, I have been asked to compare and evaluate, from the perspective of regulatory complexity, the provisions of Title II of S734 with the provisions of an alternative staff draft prepared for the Committee at the direction of Chairman Rodino and ranking minority member McClory.

First, some general observations about regulatory complexity. In the last decade Federal regulation has gone from being a topic of interest only to specialists in specific substantive areas (ICC, CAB, SEC, etc.) to a topic of complaint for citizens and politicians of every political persuasion. Even when there is strong disagreement over the desirability of certain Federal regulatory programs, there is frequently wide agreement that many present programs are overly complex. This has been a particular complaint of the small business community—the very community the legislation before you is intended to benefit. Therefore, it is important that you consider the potential complexity of the alternatives. No matter how well-intended a piece of legislation may be, it serves little purpose if the costs of compliance outweigh the potential benefits.

In this connection I should point out that there is no guarantee even that a regulatory program that is simple at the start will remain simple. Examples abound. The CAB's efforts to regulate smoking onboard commercial airliners has become so complex that the CAB has asked for public comment on whether it should begin over again or abandon the effort entirely. Similarly, the Truth in Lending Act began as Senator Douglas' simple proposition that consumers should be told the annual interest rate and the finance charge. This seemingly simple concept has led to a regulatory maze involving hundreds of pages of regulation and thousands of pages of interpretation.

While there is no guarantee that a program simply conceived will remain so, it is virtually certain that a program that starts out complex will become, over time, even more complex.

I will proceed with a comparative analysis of the two proposals. Rather than a section by section analysis, I have divided my analysis into four categories: (1) The Bureaucratic process; (2) the Significance of the Certificate; (3) Eligibility Requirements; and (4) Due Process Requirements.

(1) THE BUREAUCRATIC PROCESS

Under the proposed staff draft an application for a "certificate of review" would be submitted to the Department of Justice and within 60 days (unless extended where additional information is required) the Attorney General would issue or refuse to issue a certificate.

Under S734 the application would be submitted to the Commerce Department which would act within 90 days (with a possible 30 day extension) only after consultation with the Department of Justice and Federal Trade Commission. While the Secretary of Commerce could legally issue a certificate against the advice of the Justice Department or FTC, it is unlikely that this would happen and the value of such a certificate, if issued, is questionable since it could be challenged in court by Justice or FTC.

I have found over the years that it is almost impossible to explain to the average citizen the logic of their having received conflicting advice from separate Federal agencies. When citizens deal with their Federal government, they think of it as one government and they do not understand why it does not respond as one. For this reason, alone it would be advisable to vest the proposed "certificate" authority in one agency.

(2) THE SIGNIFICANCE OF THE "CERTIFICATE"

It appears that the legal significance of the "certificate of review" envisioned by the staff draft is that the certificate will serve as an advisory opinion of the Attorney General. The issuance of a certificate by the Attorney General indicates that in the opinion of the Attorney General the applicant's proposed export activities will not violate any antitrust laws which continue to apply to the applicant's domestic activities.

Should the initial judgment of the Attorney General in issuing the certificate be proven wrong, the certificate holder would be protected from Federal prosecution as long as the certificate is in effect provided no fraud was involved in the initial application. However, the certificate of review would not protect its holder from civil liability in a private suit for actual damages and attorney's fees for an injury caused by conduct of the certificate holder.

Thus, through the "certificate of review" the Justice Department's counsel would be available to businesses which do not have and cannot afford their own expert antitrust counsel.

The intended legal significance of the "exemption certificate" to be issued under S734 is not entirely clear. The exemption certificate would appear to exempt the certificate holder from the applicability of antitrust laws only insofar as they otherwise would apply to the export trade or export trade activities of the applicant. Thus, it would appear that the exemption holder is in approximately the same legal position as he or she would be by filing under the present Webb-Pomerene requirements.

However, it is my understanding that a major concern underlying this statutory effort is the potential liability of small businesses for the domestic effects of actions taken that would violate the antitrust laws were they not taken in connection with export activities.

Either the "exemption" applies to domestic activities (though they were not apparent or intended or the exemption would have been denied) or the exemption merely applies to export activities in which case it amounts to a finding by the Commerce Department that there will be no domestic antitrust implications. If the latter is the intent then the existence of the exemption would not appear to protect the exemption holder from any suits where domestic violations can be proven.

(3) ELIGIBILITY REQUIREMENTS

Under the staff draft, there are in effect no eligibility requirements. Any person who contemplates export activities may apply for the "certificate of review." The applicant does not have to prove anything other than the proposed export activities will not result in domestic antitrust violations.

Under S734 there are three eligibility requirements that, on their face at least, do not appear to relate to antitrust concerns.

The applicant must show that the proposed activities will (Sec. 2(a))

"(1) serve to preserve or promote export trade; . . .

"(5) do not include any act which results, or may reasonably be expected to result, in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the association or export trading company or its members; and

"(6) do not constitute trade or commerce in the licensing of patents, technology, trademarks, or know-how, except as incidental to the sale of the goods, wares, merchandise, or services exported by the association or export trading company or its members . . . ."

In addition, the applicant is required to include in written application (Sec. 4(a)) "(6) A description of the domestic and international conditions, circumstances, and factors which show that the association or export trading company and its activities will serve a specified need in promoting the export trade of the described goods, wares, merchandise, or services."

These elements, particularly the first and last taken together, would appear to introduce subjective criteria as qualification requirements that could lead to extensive regulatory and administrative complexities. If the intent of the proposed bills is to simplify and encourage foreign trade then it is best to keep the eligibility requirements as simple as possible.

(4) DUE PROCESS REQUIREMENTS

The staff draft amends the relevant antitrust statutes to exempt outright certain activities undertaken in connection with exports that would be violations if undertaken in connection with domestic activities. Having stated this exemption outright, the "certificate of review" merely functions as an advisory opinion as to the potential for domestic antitrust violations resulting from the permissible export-related activities. Since the applicant is free to act with or without a certificate of review there are not, and do not appear to be any need for, hearings and other due process requirements related to a refusal to issue a certificate. The same is probably true, although more subject to debate, of the authority (Sec. 2 of staff draft) of the Attorney General to revoke a certificate without any hearing.

Under S734 an applicant is not exempt from the application of antitrust laws to export activities unless an "exemption certificate" is issued. Thus the denial of a certificate has significant substantive impact and the bill provides for a full, on the record, hearing when requested by the applicant. Similarly, amendment or revocation of a certificate by the Secretary would entitle the certificate holder to a hearing. The concept of an "exemption certificate" issued by an administrative agency after considering a number of factors, including a "needs" test makes it extremely likely that a complex regulatory program will be inevitable.

CONCLUSION

While there is always some risk that the simple "certificate of review" approach could become more bureaucratic over time, this risk is small since the "exemption" in the staff draft is accomplished by amendments to the operative statutes and not by an administrative proceeding. The "certificate of review" process would function much like the Department of Justice's present Business Review Procedure (28 CFR 50.6).

The administrative process envisioned by S734 involving three Federal agencies and the issuance of an "exemption" certificate based on, among other things, a "needs" test could discourage the small and medium business firms intended to be its prime beneficiaries.

Mr. RODINO. We have another vote and that will be another interruption and will be additional delay, but it is unavoidable at this stage.

You just hit on what I think is really the core of the problem, this involvement of the various agencies in Government—necessarily if they are involved in the writing of regulations—and the frustrations that are going to be consequence to that when the particular industry that wants to get into export trading finds that it is confronted with all these requirements and whether or not it is going to actually be in violation of some of our basic laws, especially antitrust laws.

Is there a role that you envision for the Commerce Department, which has, of course, some expertise, to encourage this? I am not unmindful of the fact that this proposal really arose out of the Commerce Department in the last administration and of that agency's continuing interest.

Is there any role that the Commerce Department can play, consultative or otherwise, which wouldn't involve all the unnecessary regulations which might at least make evident that it does have a role in promoting this kind of commerce? Can it put its stamp of approval in this area, recognizing that the basic problem is the frustration of the businessman or business community with the uncertainty of antitrust violations?

Do you think there is any role that Commerce can play?

Mr. EMERY. I certainly think they could try to write a set of regulations that wouldn't necessarily need an antitrust lawyer to interpret them for the small business community.

They could do their best to make clear the things you can do and the things you clearly can't do, and that there is a gray area, which is the area where we lawyers make most of our money.

If it is clear, presumably we shouldn't be needed.

The problem is even if Commerce attempted to do what is set up in S. 734 there is plenty of room for argument just in the list of conditions set forth in the bill. The other thing I am sure is in everybody's minds, is if Commerce is doing that, there will be inclination by the Justice Department to be negative on this whole idea of antitrust immunity which it has been for many years. To some extent there would be a tendency for Justice to react negatively the more Commerce reacted positively.

You could well see Justice being pushed in the other direction. I don't know what Justice's opinion is on the authority that would be given them under the staff draft but, frankly, you would put Justice in a difficult position by putting the bug directly on them.

If you tell Justice, it is yours, I think Justice, in the long run, may be more cooperative than they would be if they can sit on the side and just throw darts at Commerce which is the way it works out in the Senate bill.

Mr. RAILSBACK. Will the gentleman please yield?

Mr. RODINO. Yes.

Mr. RAILSBACK. My understanding is that you are absolutely right in that there has been a history of friction between the Justice Department and the Commerce Department on some of these activities.

My further understanding is that now there has been an agreement reached between the Commerce Department and the Justice Department whereby the Justice Department has acquiesced in giving primary responsibility to the Commerce Department to make the initial findings but with Justice given some review capability.

I agree that the bills before us are much too complicated. I happen to favor giving the responsibility to Commerce with Justice Department review, but it has to be simplified.

Mr. RODINO. I think we are going to recess for another 10 minutes and return.

[Recess.]

Mr. RODINO. We trust that is the last interruption and we will be able to complete our questioning. So we will go on.

Mr. Rees, I was interested in the comments you had to make with respect, first of all, to Webb-Pomerene and your apprehensions of the business community so far as some of the requirements under the proposed certification procedure.

What I would like to develop in my question to you is, just as I stated to Mr. Emery, whether or not you feel there is any role Commerce should be playing in this process since it does have the expertise in understanding the concerns of the business community in getting into export trading?

Mr. REES. Thank you, Mr. Chairman.

My basic view is that the certification procedure, no matter which agency has jurisdiction, makes it extremely difficult for any kind of sophisticated export trading company to operate because that company would come into a lot of questions if you shifted from one product to another or one country to another.

You would have to amend your procedure and go through it again. This is why I like the commitment. There might be some more definition, if you wish, in section 7 of the committee print.

This act shall not apply to conduct involving trade or commerce with foreign nations unless such conduct has a direct and substantial and foreseeable effect on trade or commerce among the several states.

If you wish, you could perhaps expand your definitions but to bring an agency in such as Commerce under the certification procedure I think would be difficult.

Let me explain something that I am working on now. I am working on this very actively both between my law practice and also our export trading group.

In the act it gives banks the right to own export trading companies. The big fight in the Banking Committee will be what percentage of an export trading company. We have about 10 banks in the United States that have a strong structure overseas: Chase, Citi, and Bank of America.

Each of them probably has 100 offices overseas. Some of them might have a half dozen offices in one country.

Almost automatically you have developed an economy of scale of a major export trading company when an export trading company is actively allied as a subsidiary of one of the major banks.

But what about your regional bank? What about Riggs or First National of Maryland? What about the smaller banks? Union Bank & Trust was just bought by a foreign bank so they now have an economy of scale.

But regional banks that have an office maybe in London and Hong Kong, they are stuck more or less in one region, they are not national banks so they would be limited in terms of economies of scale.

To effectively compete against the big national banks I would think it would be good to form a joint venture, say, of a main or regional bank in this Washington area with a regional bank, say, in Singapore and also with an active export trading company. This becomes export company No. 1.

That same regional bank might want to have an export operation in Latin America. They would then have a joint venture with regional bank No. 2 in Mexico City plus an export trading company.

They would have a series, and, therefore, they could effectively serve their clients.

I am afraid if they don't have this right, if they can't do this, the major national banks are going to gobble them up. They will come in and use their export trade company as a loss leader and take away their wholesale business. This is the trend of banking today anyway.

If you don't have some clarification of the antitrust law you are going to have a problem. Because this will be the first time they are through this procedure, it will be almost impossible to lay out to the Department of Commerce at the beginning what they plan to do.

They really don't know what they will do until they put it together and find out how it operates.

I don't know if that is an around-the-barn answer to your question.

Mr. RODINO. The bottom line in what you suggest is that the solution has to be simple and certain in order to really create that kind of climate for the prospective export trader to come in.

Mr. REES. Yes.

Mr. RODINO. Mr. Johnson, let me address that same question to you, as one who is now involved in an export business that has grown from $14 to $30 million.

What has been the difficulty up until now?

Mr. JOHNSON. I think our difficulties have to do with cost. Foreign business costs more. Somehow when the Government tries to help me, my costs go up, they don't go down. I have to get lawyers and accountants.

What concerns me about the whole certification procedure is what it is going to do to our costs in being competitive in foreign markets. The costs we incur are indirect costs. I cite the help we got with the DISC as an example. Those laws are very complicated for us to understand.

We did set up a DISC. One of the big eight accountants helped us set it up. Several years ago the accountants told us we had set it up all wrong and were in danger of jeopardizing the deferred taxes unless it was corrected. They sent us a bill eventually for $30,000 covering their work in restructuring our DISC company. When I explained that was a rather high cost they said, yes, but because of their work we were able to defer an additional $50,000 of taxes. In effect the company was better off by $20,000 of taxes we didn't have to pay now, the accountants were better off by $30,000 cash in their pocket, and the Government came out short.

In another example, we noticed in one of our contracts there was a clause that was questionable on the subject of boycotts. Somebody flagged it. We found two or three others that had involved shipments to the Middle East which might also have questions. We got our lawyer. We had a 1-day meeting. We asked for a brief memorandum to summarize the lawyer's advice so we would have something for the record and catch these things soon in the future.

I got a book and a bill for $3,500. When I said I didn't ask for a whole treatise, our lawyer said, yes, but you didn't seem to understand what was happening and I thought you better have this for the record. We did negotiate that bill.

Mr. RODINO. Are you suggesting that the version that seems to provide for more bureaucracy and more regulations and more agencies may just be more beneficial to lawyers and not to the companies that we are trying to help?

Mr. JOHNSON. I couldn't have said it better. The Government's costs are going to be higher with three different agencies all having jurisdiction—I don't see how anybody is going to really convince a civil servant that he should certify something that does not "unreasonably enhance, stabilize or depress." With all these clauses in the certifications a civil servant is going to have great difficulty. It's going to require a lot of time and it will be very difficult.

I would rather put my faith in the commonsense of the American people. I believe in the market system as a better arbiter of what is right and what is wrong.

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I think Arjay Miller put this whole question of business ethics in excellent perspective when he said it isn't a question of law. Just ask yourself how would it look on TV?

I think one answer to your question to what Commerce might be able to do to simplify the procedure would be a system that would allow prompt response without judgment on the part of the Government.

I disclose what I am going to do. The facts are laid out in the open. They are there for anybody who wants to read them. Then let the market system complain, let the individual private citizen or the Justice Department or other Government agencies complain. But give me immunity until such time as somebody proves I am guilty rather than the other way around of going through proving I am innocent at a time when I haven't done anything yet.

I think if we would rely more on the judgment of people, less on lawyers, we could do things at a lower cost and be more competitive in the world markets than we are.

Mr. RODINO. Thank you.

I am afraid I misread what we were going to do on the floor and we are going to have to leave you again. We have a recorded vote on the conference report. We will be back in 10 minutes.

[Recess.]

Mr. RODINO. Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

My first question is to Mr. Johnson.

You have made a pretty successful record for your company. Do you think you could have been more successful if you had worked cooperatively with your competitor?

Mr. JOHNSON. Our competitors are Eastman Kodak and Du Pont. They really don't need much of our help, nor do they offer us much hope for help in foreign markets.

Mr. BUTLER. Then what do you see in this legislation for youself?

Mr. JOHNSON. I am here as a businessman because I believe trading companies can increase awareness of our need to increase exports, and can help bring that about. I think we as a company are probably a little beyond it. We hired our own international operations vice president several years ago. We have our own internal staff of 3 senior area representatives under him now plus 25 employeees in Europe. So I think we as a company have probably grown beyond the need.

I think 10 years ago when we were a $6 or $8 million company it could have made a big difference. We postponed hiring that international vice president for 5 or 6 years. It was in the budget every year, and we would in the end cut it out.

We might have moved faster if there had been more opportunities to us local export trade associations. I am not sure Government people would have been helpful, but I think the bringing together of three or more companies with common problems in an association or federation might have speeded up the process.

Mr. BUTLER. Go back 10 years then. Ten years ago, would you have sought the assurance of a certificate of antitrust immunity if it had been available either from the Department of Commerce under the H.R. 1648 type of procedure or from the Department of Justice under the staff draft procedure?

Mr. JOHNSON. No. I don't think so. Again, it is too much fuss. It is not worth it.

Mr. BUTLER. You think there is too much fuss even under the staff draft?

Mr. JOHNSON. Was your question under the staff provision?

Mr. BUTLER. My question was twofold: Under the Department of Commerce procedure or under the Department of Justice procedure, and I think your response was directed to its availability under the Department of Commerce.

Mr. JOHNSON. Yes. I missed that. The three-agency Department of Commerce/Justice/FTC procedure would have been a great deal of trouble; yes, sir.

Mr. BUTLER. If the staff draft had been the law 10 years ago, do you think you would have looked at it——

Mr. JOHNSON. I think we would have been more likely to look at it.

Mr. BUTLER. I suppose, then, that the thrust of your testimony is you have to make a kind of cost-benefit analysis from the point of view of your business; it depends on your size and development, or where you are, as to whether you are willing to undertake this sort of hassle, as you refer to it.

I judge also from your testimony that from your experience you are influenced by whether you can afford the legal or accounting fees that might be involved.

Mr. JOHNSON. I am concerned that those costs are not helping us be competitive. We have had a 25-percent increase in the price of our products with the change in exchange rates which increases the value for the dollar and that isn't helping. More lawyers' fees simply add further to our costs.

We compete with Japanese and with Europeans, and they don't seem to have all these legal costs.

Mr. BUTLER. We on this committee are lawyers but not very well paid so we are somewhat sympathetic with your problem. Maybe it is professional jealousy. I don't know.

Mr. Rees, you have had a great deal of experience with regulatory agencies from several points of view. The Department of Justice is not a regulatory agency. How can we expect the staff draft to make it any more capable of being one?

Mr. REES. The staff draft states if a person is unsure under section 7 of the staff draft here about the transaction, they are worried as to what leeway do they have, they would then apply to the Department of Justice and say, here is our factual situation, do you perceive any violation of the antitrust laws with this situation?

Then the Department of Justice would come in with an answer, yes or no, or say if you make these changes, then you will be OK.

This is the same type of procedure I go through with a client when I ask for a letter ruling from the IRS as to whether a certain business transaction would fall within a certain section of the Internal Revenue Code.

I don't look at this as administrative. I think it is really an agency giving an opinion as to the interpretation of the law.

Mr. BUTLER. This is not much different from a codification of existing business review procedures in the Department of Justice. If that is the situation, why hasn't that been used more in the past?

Mr. REES. I don't know. My impression of the Webb-Pomerene Act in the past is it has been a fairly inactive act. It has not been really utilized extensively by U.S. business. It would only cover at the most 1.5 percent of our total exports.

Justice generally has been rather negative on the Webb-Pomerene Act. This is why it has not been examined since 1916. Despite the fact that the world's economic situation and the development of antitrust laws in other countries have really been evolving, I just have the gut feeling when you go to Justice they would tend to be negative.

It is the same feeling I have when I go to the IRS. I have written questions to the IRS backed up with about three Tax Court rulings that have been all the way through the circuit court of appeals system, and Justice will still come back with a bad letter.

I do feel there needs to be a procedure for a person who gets involved in a series of regional banks and export trading companies. Probably if I were the attorney under your bill I would advise them to go through this proceeding and ask for a ruling, just to be sure.

In a business transaction, let's say a corporate merger, nontaxable, generally you are pretty sure.

There has been a lot of letter rulings in the past, a lot of litigation in the past, but if you are going through a very complex merger even though you think you are right, you still go to IRS to make doubly sure because when they give you that opinion, they are standing on the other side looking at it from their view, not yours.

Mr. BUTLER. That is what you envision would develop under the staff draft, routine inquiry on the Department of Justice?

Mr. REES. Yes. It would be a standard business review.

Mr. BUTLER. Mr. Emery, you have had broad experience. I really never knew what the Director of the Federal Register did, but it must be an exciting life to watch those things go by each day. I know you hate to be separated from that job.

You must have some perceptions based on your experience there. I am interested in knowing basically, from your observations what problems tend to arise when you have a certification program administered by one agency but consultation is required with another or others.

Mr. EMERY. I think you have immediately established a potential problem. The areas where we have tried I don't think have worked very well.

Aviation noise was split between EPA and the FAA, and I have yet to talk to anybody in either of those agencies that thinks it is working well. Each blames the other.

The minute you create that dual role, knowing the way bureaucracies work, you have a potential problem, especially since everyone knows Justice's feeling about this kind of legislation to start with. You put them in the position of being able to say no every time Commerce says yes.

Mr. BUTLER. You get into personality conflicts too, I guess.

Mr. EMERY. Oh, for sure.

Mr. BUTLER. What have they done to resolve the problem—FAA and EPA?

Mr. EMERY. I think they have battled it out pretty much over the years. I heard a complaint from somebody in FAA just recently that would suggest it has not yet been resolved. There is a lot of tension between the two agencies as to who is really in control and who should be in control.

Certainly FAA thinks they should be in control, period; it is a safety problem, not a noise problem.

Mr. BUTLER. Do you have some other illustrations? I think that is a pretty good analogy to what we may be facing in the Senate bill. Do you have any other illustrations in your experience?

Mr. EMERY. Off the top of my head I can't think of any other where the statute splits it quite the way it was done there. As you stated, really it is a human problem more than a bureaucratic problem. The minute you have one agency in charge but another agency having an oversight role, you create the tension.

In the transportation area generally since the Department of Transportation was created you have had tremendous tension between DOT and the ICC on the one hand in the area of the rail and trucking and between DOT and CAB, on the other hand in aviation matters.

Any time you have two bureaucratic agencies involved in the same substantive area there is a good likelihood each would rather have it by itself and, therefore, there will be tension.

Mr. BUTLER. The obvious conflict of who is God must always be there. Can you see any way out of it? Is there any way to minimize this obvious problem?

Mr. EMERY. I think the ideal way is not to have more than one party in charge. Even though I know the business community is suspicious of Justice's attitude, I think they would be better off as a practical matter in the long run having to go directly to Justice and put them on the spot. If Justice says no, you can ask them why, as opposed to dealing indirectly with Justice through Commerce.

In the long run I think the business community would probably be better off with Justice even though I am sure Justice is not eager to have this authority.

As Mr. Rees said, I don't see the staff draft setting up a regulatory agency in any sense of the word. That in itself has some advantages.

It merely asks lawyers to give a legal interpretation as to whether some action is in compliance with the act rather than to make a judgment decision as to whether an administrative exemption authority should be granted.

Mr. BUTLER. Mr. Chairman, is my time up?

Mr. RODINO. If you have more questions please go ahead.

Mr. BUTLER. I yield to the gentleman from New Jersey and then I will come back.

Mr. RODINO. Mr. Hughes.

Mr. HUGHES. Thank you, Mr. Chairman.

I want to also thank the members of the panel. I really have just one area of inquiry.

Last week the chamber of commerce testified before the Senate Judiciary Committee and recommended a combination of the

Senate bill with H.R. 2326 which would incorporate a negative clearance proposal.

How do you feel about that, Mr. Rees? Are you familiar with the recommendation for a negative clearance provision?

Mr. REES. Both of us are members of the U.S. Chamber and the Export Trade Committee has a Subcommittee on Small Business and International Trade, and Gordon is our chairman.

At times we do find ourselves not in total agreement with the U.S. Chamber.

Mr. JOHNSON. I was not aware of that statement until I saw it a little earlier this morning.

The answer to your question to me: That is a far simpler, faster lower cost way to do business, to have a businessman come in and say to the Government, I certify that I am not going to do anything bad, and for the Government to believe him.

In other words, under the negative clearance proposal as I understand it, I am innocent until somebody proves me guilty rather than the other way around where under the procedure in S. 734 the Government has to have findings to really judge all of my material, all of my applications and then three different agencies have to agree, yes, this guy is probably telling the truth.

To me this negative clearance proposal is a much simpler way to handle the certification procedure.

Mr. HUGHES. As I understand it, one of the features would be an invitation for a certain period for the competitors to come in and make negative comments.

Do you feel that would be a healthy part of the process?

Mr. JOHNSON. I would much rather rely on the marketplace to make sure I do right than to have Government bureaucrats telling me whether I am doing right and having to hire the lawyers to deal with the bureaucrats.

Mr. HUGHES. Mr. Rees.

Mr. REES. If I may comment, I was just reading it.

I read section 206 during my first statement. It is a long laundry list of material you have to make available to Commerce. I don't want to let my competitor know what I plan to do. I certainly don't want to publish all of my game plans and everything my business might be doing, potential contracts I might be signing in the Federal Register and broadcast it to my potential competitors.

I don't like the attitude where businessmen, if they do anything overseas, are going to do something to contravene the antitrust laws.

In most countries they have laws that are nearly as tough as ours. I am looking to make sure there isn't some long arm from the Department of Justice to tell me even though I am in compliance with the common market antitrust laws I am not in compliance with some long-armed concepts that they might have, and they have a lot of long-armed concepts that go well outside the commerce clause of the Constitution.

What this would do is to say, you forward to the Department of Commerce and then they will publish a summary of the statement in the Federal Register, and then everyone will have 60 days from that filing to come up with complaints.

In going through section 206 before there are a lot of determinations that I really—let's say it is an export trading company—that I can't predict I would be doing.

So in a registration statement I either predict every possible thing that could happen to an export trading company or I more or less say what I am doing now which would mean every time I had a new venture after my first registration I would have to come up with an amendment.

If I were exporting food packaging machinery to Asia and then decided I had a good farm machinery thing going down in Mexico, I would have to come up with a new amended statement because my original statement said I was exporting food machinery to Asia.

Also, if I were in the middle of a very competitive situation but that situation was not in my original certificate, I would probably have to amend that and have it published in the Federal Register.

I tend to think this is very cumbersome because many of the things we might be doing have nothing to do with the antitrust laws but because we have the original certificate this would be an amendment to the original certificate.

Mr. HUGHES. Mr. Johnson, did you have something to add?

Mr. JOHNSON. I think there are two separate issues, Mr. Hughes, and Tom. One issue is section 206, all of the things that have to be disclosed, which is in the Senate bill and is not in the staff draft. The staff draft is much simpler.

As I understood your question, your question was also dealing with the basic approach of publishing the filing in whatever form it is in, whether 206 or the staff draft, and then allowing time for objections.

If objections are raised, then immunity would be delayed and if no one objects, immunity automatically adheres.

I agree with Tom, 206 has a lot of spelled-out things in the law that really are not necessary to the judging of whether really all this will violate the antitrust laws.

Mr. RODINO. Will the gentleman please yield?

Mr. HUGHES. Be happy to.

Mr. RODINO. As I understand it, to get that negative clearance you would have to, under the version that is presented here, provide all the information which then would be made public. It is pretty much as described, a laundry list.

Isn't that one of the reasons why a business is rather reluctant to come forward?

Mr. JOHNSON. I think you are right but speaking personally, I think my competitors already know or can find out the information in the application. As a businessman I would rather operate more in the open and rely on the marketplace than have this continuing back and forth with the Government, with lawyers as the intermediaries for everything I do.

Mr. RODINO. But as to the staff recommendation, H.R. 2326, with the amendment that we have proposed, isn't that preferable because it eliminates the need for the laundry list and yet you get the so-called letter from the Department of Justice?

Mr. JOHNSON. Yes. I much favor the lack of the long laundry list. I was speaking more to the issue of the Justice Department having to approve it.

We have built equipment with lasers and I have been through the Bureau of Radiation and Health trying to give us a clean bill of health. The inspector who has the responsibility to judge what we do has to prepare a piece of paper to protect himself 2 years from now if something happens. He has to have the piece of paper in the drawer to protect himself because it was his judgment, and before he would sign off on that piece of paper we had a lot of unnecessary work to do.

I think what I heard in the comments proposed to the Senate committee—I don't think it was an official proposal at this point—the idea of immunity and not requiring the Justice or Commerce to judge whether I am right or wrong but say OK, we believe you, go ahead. That fits very well with the staff draft. It is much simpler.

Mr. HUGHES. I have no further questions.

Mr. REES. I might just say if you come up with your version and the Senate comes up with its version it will be a very interesting conference committee because the disagreements are very broad.

You might look as a possible compromise at the chamber's suggestion but only as a compromise.

I am completely in favor of the staff draft from your subcommittee. But, again, there needs to be something in the chamber position that would protect a person in making public transactions he might want to go into which if he makes them public would mean he would lose the transaction.

Mitsubishi has an office here with six competent people. They read the Federal Register every day and the Congressional Record. It gives them a nice list to go through. Let's check this out and this and they don't have to worry about a 60-day waiting period.

Mr. HUGHES. Thank you. Thank you, Mr. Chairman.

Mr. RODINO. What happens during the 60-day period when all the information is made public? Isn't the competitor free to do what he wants in this period of time? Doesn't this give him an advantage that one didn't even foresee? Certainly this isn't what was intended.

Mr. REES. It certainly does. It gives your own competitors in the United States the advantage because they could perhaps structure it so it wouldn't come under the act and you have already telegraphed your punch.

But as for your foreign competitors, they might have antitrust laws but not the Sherman Act and the Clayton Act. What you are proposing would be just fine for them.

Mr. RODINO. I saw this whole problem as one where we were interested in providing some kind of assistance to those who were in the business community who wanted to get into the export market. This is the way it was presented to me—about apprehensions and concerns on the part of the business community to do so because they were uncertain about the reach of antitrust laws. That was primarily the issue.

The proponents really focused on small- and medium-sized businesses because bigger businesses had a galaxy of lawyers, and they were properly advised. So the course you are talking about is not really something they were concerned with.

If that is the case and that is the premise they focused on, then isn't it true a big concern is to do away with that apprehension, that anxiety on the part of these people? They can go to the Justice Department under a provision we have written and get a response, and clear the air rather than to go through all this other rigamarole and wait a period of time, provide a lot of information which is going to be out there in the public and gives competitors an undue advantage. Meanwhile the uncertainty remains unless nothing is done after the 60 days, in which case the so-called negative clearance applies.

Doesn't that lead to uncertainty again as against what we have attempted to do with the simpler thrust of clearing the air about antitrust violations?

Doesn't this seem to be the crux of the problem?

I have no pride of authorship. I am just trying to deal with it as simply as we can and if there are people waiting to come into the markets, by golly, let's give them the best opportunity possible without imposing on them.

Do you have any comment as to the way I view it?

Mr. JOHNSON. I think, Mr. Chairman, you have summed it up very well. There is a lot to be said for having the Justice Department give me a positive clean bill of health for my piece of mind rather than just a, well, they had their 60 days and they didn't object. Either of those two are much simpler than what is laid out in this original Senate bill.

Mr. RODINO. Tom.

Mr. REES. I agree completely with Gordon Johnson. When I was an exporter around the time of the Korean war it was difficult to get products. I represented companies and I also bought my own account and serviced an area in Mexico.

The situation is the same today. Medium and small companies would prefer the domestic market. You have to drag them screaming and puffing to get them into the export market.

I believe they have to be in that export market because if they are not, they are going to lose their domestic market. I could talk about some major industries such as steel and autos where that happened.

I think we have to have an aggressive export market but people don't want to get into it because they have never had to and an export transaction is far more complex in all ways.

The domestic market is always the No. 1 priority.

It has been in terms of Congress and every administration. The minute there is a shortage, steel, scrap, or soybeans, we put an embargo on. We are not allowed to deal with our foreign markets. We have to make export a No. 1 priority in this country. It has never been. It has always been about the last priority.

Every roadblock you have that will frighten the businessman will cause that businessman to opt for the domestic market. If it is a Webb-Pomerene that isn't working, if it is a DISC operation that is not working, if it is an Eximbank just cut down in their financing, they will not go in.

So as long as these remain it will be almost impossible to get them to come to you as an export trading company and say, will you do something for a foreign market? They don't want to be bothered with it.

I think this is an unwise choice. I think Gordon Johnson made the wise choice, and you can see what he has done for his product. It is very competitive. He has developed a beautiful domestic market but he has developed, more important, a good overseas market.

I think we need more of this type of spirit. If we have that in the small business we will be competing well overseas. That is my very firm belief.

Mr. RODINO. Mr. Emery, do you want to comment?

Mr. EMERY. The only comment I would have on this "negative appearance proposal" is that as I hear it described it sounds to me much like the original intent of the procedure the ICC had whereby if you were a trucker and you had certain routes and you wanted to add a commodity to the routes or a short spur route to the ones you had, they would merely publish an announcement in the Federal Register that such and such a company had applied for that and it would be very routine provided nobody objected.

We all know what happened. Very soon a process developed where everyone always objected to everything anyone else proposed to do, whether they had any interest or not.

We developed that tremendously complex process we are just now in the process of untangling. I am not suggesting that has to happen but there is certainly the risk that could happen.

Mr. BUTLER. I have nothing further.

Mr. RODINO. Mr. Evans.

Mr. EVANS. Thank you, Mr. Chairman.

I, of course, have read most of the statements and I am very interested in the certificate of review. I don't think it would serve any purpose to reiterate what has been said.

I think the consensus is that the certificate of review on the committee staff draft, which basically encompasses the legislative language contained in the bill that I introduced last year and this year, is preferable to deal with exports by small businesses than the corresponding Senate bill.

Would that be a correct statement?

Mr. REES. Yes.

Mr. JOHNSON. Yes.

Mr. EMERY. Yes.

Mr. EVANS. Thank you, Mr. Chairman.

Mr. RODINO. I want to thank you, gentlemen, for coming here and being so patient, especially during our interruptions.

As you can see, we have done it right on time. Thank you very much.

This concludes this morning's hearing.

[Whereupon, at 12:30 p.m., the subcommittee was adjourned.]

ADDITIONAL STATEMENTS

STATEMENT BY
NATIONAL MACHINE TOOL BUILDERS' ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
MAY 7, 1981

I. INTRODUCTION

The National Machine Tool Builders' Association (NMTBA) is a national trade association representing over 400 American machine tool manufacturing companies, which account for approximately 90% of United States machine tool production. Although the total machine tool industry employs approximately 90,000 people with a combined annual output of around four billion dollars, most NMTBA member companies are small businesses with payrolls of 250 or fewer employees.

While relatively small by some corporate standards, American machine tool builders comprise a very basic and essential segment of the U. S. industrial capacity and have a tremendous impact on America. Ours is the industry that builds the machines that are the foundation of the United States' industrial strength and military might. Without metal cutting and forming equipment -- machine tools -- there could be no manufacturing as we know and have come to rely upon it today. From a consumer point of view, absent modern machine tools there would be no domestically affordable nor internationally competitive luxuries of modern life. And fundamentally more important, without state-of-the-art technology there would be a dangerously less reliable capability within the defense industrial base to meet the needs of national security in peaceful times, much less the demands of increased military production in time of a national emergency.

NMTBA and its member companies have devoted considerable time and effort to increasing exports.

NMTBA, on behalf of the American machine tool industry is devoting its own resources to the development and maintenance of international markets everywhere in the world. The Association has two people who spend virtually their full time overseas promoting United States machine tool exports with considerable assistance from the Department of Commerce.

NMTBA develops seminars and workshops to train our members' people on international financing, export licensing, or any other subject that will benefit a machine tool builder. We conduct market research to locate new and promising markets for industry development. We have conducted roughly thirty Industry Organized, Government Approved (IOGA) trade missions to help gain a foothold in these new markets, and approximately half a dozen are planned for 1981 and 1982. We sponsor foreign exhibitions so that our members will have more opportunities to display their products overseas. In addition, we often work in close conjunction with the Commerce Department on such activities as recruiting exhibitors for export promotion events such as catalog shows, video tape shows and technical seminars. We organize reverse trade missions to bring foreign buyers to our plants. And we bring large groups of foreign visitors to the International Machine Tool Show in Chicago every two years. The Commerce Department has worked closely with us in the development and implementation of these programs, as have the commercial officers in our embassies and trade centers around the world.

However, even in light of all of these export promotional activities engaged in by NMTBA, as an Association representing the industry generally, we are constrained from actually becoming involved in what we hope are the final fruits of our efforts -- namely, arranging actual sales for our members. For this reason, we are most gratified by the growing Congressional support for Export Trading Company (ETC) legislation such as that currently before this Subcommittee. We firmly support ETC legislation as a means by which to establish U.S. export trading companies which could provide all of the supporting facilities and services which U.S. exporters now most lack by contrast with their foreign competitors. Such ETC's would thus enable thousands of small and medium-sized American producers to combine their resources in a variety of ways and configurations in the interest of more competitive overseas marketing of American goods and services.

II. EXPORTS ARE A VITAL ELEMENT IN OVERALL U.S. ECONOMIC PERFORMANCE

The importance of export trade to our overall national economy is often underestimated. In an economy which has until only recently been primarily oriented to the domestic market, it is not hard to understand why such a misapprehension exists.

However, even more disturbing are the statements of those who appreciate the significance of foreign commerce, but erroneously believe that U.S. export performance has been "excellent", and "is one of the few bright aspects of...the economy as a whole".[1]

Although it is true that the ratio of exports to Gross National Product (GNP) rose from 4.2% in 1972 to 7.5% in 1979, it is also true that the U.S. imports grew equally as fast in importance relative to GNP from 5.1% to 8.7% in the same years.[2] Therefore, although in absolute terms or as a percentage of our domestic economy, the volume of U.S. exports has increased over the past several years, this growth has been negated by rapidly expanding imports, the result of which has been an aggregate trade deficit over the past five years exceeding $140 billion. It seems that we no longer think in terms of trade surpluses, but rather have become so accustomed to the *status quo* that we take satisfaction in boasting of decreasing trade deficits. Surely, we can do better. Further substantiating this disturbing trend, recent studies show that the "U.S. share of world markets declined from 21.3% to 17.4%

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[1] U.S. Congress, House, Committee on the Judiciary, *Statement on International Application of U.S. Antitrust Laws*, March 26, 1981, by James A. Rahl, Before the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, on H.R. 2326, H.R. 1648 and H.R. 2459, 97th Cong., 1st sess., 1981, p. 4.

[2] U.S., Congress, Senate, *Export Trading Companies, Trade Associations, and Trade Services*, S. Rept. 97-27 to Accompany S. 734, 97th Cong., 1st sess., 1981, p.4.

over the past 10 years, the largest relative decline among major industrial exporters."[3]

Narrowing our focus to just our own industry, it is important to point out that while the domestic U.S. machine tool market has been oscillating with very little real growth since the middle 1960's, the world market has grown substantially. Unfortunately, most of this worldwide expansion has been absorbed by our foreign competitors, eroding our market share.

In the middle 1960's, the American machine tool industry supplied approximately one-third of the total global market. In other words, one out of every three machine tools consumed in the world was produced by an American machine tool builder. However, according to American Machinist, as of the end of 1979, that portion had fallen to only 17.1%. In short, over the past 13 years, our share of the world market has plummeted by almost 50%. This dramatic decline is the result of two factors. First our domestic market has been invaded by foreign competitors on a scale never before dreamed of. For example, since 1964, America's imports of foreign machine tools have more than tripled, growing from 7% of total consumption 15 years ago to over 25% in 1980. It is obvious that, because the United States is the largest open machine tool market in the world, our foreign competitors have pulled out the stops and are aiming their export marketing efforts directly at America.

Second, and this is the aspect that we wish to focus on at this time, our share of the export market has also declined. When we look at the dollar value of our exports, the results of our efforts look encouraging. But if we look at American exports as a percentage of all of the machine tool exports in the world, the results are indeed very discouraging. We have been losing export market share at an alarming rate. Our share of the world's machine tool exports fell from 21% in 1964 to just 7% last year, placing us well behind West Germany and Japan as a machine tool exporting nation.

Finally, and perhaps most alarmingly, in 1978 the United States suffered its first machine tool trade deficit in history, with imports exceeding exports by some $155 million. And, to make matters even worse, this deficit trend continued through 1980. Even though our exports grew by 15.8% over 1978 levels, imports soared by more than 45% to produce an even larger trade deficit of almost $400 million in 1980.

While countries like Canada export 25% of their gross national product, Germany 22.6%, and the United Kingdom 23%, the U.S. consumes all but 7.5% of domestic production. Recent statistics indicate that only 8% of this country's 250,000 manufacturers ship their goods abroad and, of those, a mere 100 industrial giants account for more than half of all U.S. exports. And while it is true that our enormous trade deficit is caused primarily by oil imports, it is striking to note that had we maintained the share of manufactured exports that we enjoyed in 1960, we could be paying for our oil bill in 1981 without a trade deficit.

Therefore, we commend the Congressional sponsors of Export Trading Company legislation which is designed to spur creation of large scale American trading companies that would provide a much needed export vehicle for small and medium-sized business.[4] Of course, one of the essential elements of this legislation is the clarificaton of the parameters of U.S. antitrust law with regard to export trade activities. It is our firm belief that the increased certainty of application of the law which would be fostered by such clarification would have a significantly beneficial impact on encourageing numerous U.S. firms, which under current circumstances are discouraged by the irresoluteness of existing antitrust law, to participate in joint exporting ventures. This, of course, is the issue which is the focus of these hearings, and the one to which we will address the balance of our comments today. Specifically, we will direct our remarks to your bill, Mr. Chairman, H.R. 2326, the "Foreign Trade Antitrust Improvements Act of 1981," cosponsored by Mr. McClory, and Mr. McClory's separate proposal, H.R. 2459, the "Commission on the International Application of the United States Antitrust Laws Act," as well as the previously referred to more comprehensive Export Trading Company legislation (H.R. 1648).

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[4]U.S. Congress, House, A Bill to Encourage Exports by Facilitating the Formation and Operation of Export Trading Companies, Export Trade Associations, and the Expansion of Export Trade Services Generally, H.R. 1648, 97th Cong., 1st sess., 1981.
A substantially similar measure, S. 734, the "Export Trade Association Act of 1981," unanimously passed the Senate on April 7, 1981.

THE CURRENT UNCERTAIN PARAMETERS OF THE U.S. ANTITRUST LAWS AS APPLIED TO INTERNATIONAL TRADE SERVE AS A POWERFUL EXPORT DISINCENTIVE

Mr. Chairman, we commend you and Mr. McClory for your appreciation of the fact that "antitrust constraints [have] remained a strong concern to potential exporters,"[5] and that "this "concern is fundamentally born of uncertainty."[6] In contrast, several witnesses which have appeared before you in these hearings have suggested that it is not "clear that the antitrust laws have played a significant role in deterring export activity," and that therefore "the need for ... changes in the antitrust laws in order to promote exports is [also] not all that clear."[7]

Additionally, it has been charged that the uncertainty in this area of law and commerce is grounded more in indeterminate "perceptions" and "feelings" rather than specifically identifiable problems. And that even conceding the genuineness of these doubts, they do not differentiate antitrust concerns in foreign commerce from antitrust and other legal problems in general. The inevitable conclusion of this line of reasoning is

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[5]U.S., Congress, House, Representative Rodino speaking for his bill, H.R. 2326, to amend the Sherman Act and the Clayton Act to exclude from the application of such acts certain conduct involving exports, 97th Cong., 1st sess., March 4, 1981, Congressional Record, H. 779. (emphasis added)

[6]Id., Representative McClory speaking on behalf of H.R. 2326. (emphasis added)

[7]U.S., Congress, House, Committee on the Judiciary, statement of A. Paul Victor, March 26, 1981, before the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, concerning H.R. 2326, H.R. 1648 (Title II), and H.R. 2459, 97th Cong., 1st sess., 1981, p.3.

that "(b)usiness itself is uncertain, legal risks are seldom fully covered, and, of course business abroad has its own risks and uncertainties."[8]

However, in response to these unfortunate misconceptions, there have also been a number of witnesses who have supported your understanding, Mr. Chairman, and that of Mr. McClory, that the uncertainty in this area of the law is a strong concern to potential exporters. We also affirm the belief of these later witnesses that "there is a need for clarification in the U.S. antitrust laws as to...foreign activities,"[9] and that the "[c]urrent uncertainty on the basic substantive scope of [these laws] has been damaging...to United States export interests."[10]

We strongly reject the allegation that the legitimate caution of U.S. business in this complex area is nothing more than an unfounded perception of a nonexistent reality. Unmistakably, the record already created by these hearings themselves clearly evidences a body of legal opinion in this area which is characterized by a plethora of judicial and administrative interpretation of statutory antitrust law, as well as government enforcement policy, which most charitably can only be described as confusing and, in the extreme, contradictory.

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[8] Id., Statement of James A. Rahl concerning H.R. 2326, H.R. 1648 and H.R. 2459, p.5.

[9] Id., Statement of David N. Goldsweig concerning H.R. 2326, H.R. 1648 and other related proposals, p.2.

[10] Id., Statement of James R. Atwood concerning H.R. 2326, and related proposals, p.2.

Moreover, even assuming that the uncertainty experienced by American business is only an unsubstantiated perception, isn't the mere fact that such an erroneous belief exists a significant comment on the lack of explicitness of the law in this area? And isn't such a perception, which actually does inhibit many businesses from pursuing valuable export opportunities for fear of potentially devastating treble damage suits, reason in itself to instill a greater amount of exactitude in this area of trade regulation.

Finally, as businessmen we readily admit that a degree of uncertainty and risk is necessarily attendant to any commercial endeavor. Certainly, we do not expect, nor do we even seek omniscience in our business dealings. However, we do object to the contention that because all business, both domestic as well as foreign, is to some extent uncertain (a proposition we do not disagree with) that it is, therefore, valid to say that there is no difference between antitrust in foreign commerce and antitrust in general. Such an assertion we believe implies an incorrect comparison of the uncertainty an American business faces in its domestic activities to that which it must deal with in international competition.

The U.S. Antitrust laws as applied to domestic commerce are designed to preserve competitive equality in the U.S. market. And, although they may not be perfectly drafted nor precisely clear in every case, at least there is commercial equality in that all business competitors in the U.S. market have to play by the same rules. Unfortunately, such competitive equality does not currently exist in the international arena. Without great elaboration, suffice it to say that even skeptics have admitted that not only are foreign business competitors often perceived as playing by different rules, but "they often undoubtedly do."[11]

Therefore, the really meaningful comparison to be made is not of the respective uncertainties faced by American businesses in the domestic market vis-a-vis foreign trade, but rather of the trade laws which U.S. firms must operate under vis-a-vis those which their foreign competitors must comply with.

IV. APPLICABLE U.S. ANTITRUST LAWS: THEIR INTERPRETATION AND ENFORCEMENT

Sherman Act sections 1 and 2[12] prohibit both conspiracies to restrain, and attempts to monopolize, the domestic or foreign commerce of the United States. The Clayton Act of 1914 [13] prohibits anticompetitive mergers by all firms engaged in domestic or foreign commerce. In general, these laws apply to the transactions of both domestic and foreign firms whether they occur in the United States or abroad.[14]

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[11] Statement of James A.Rahl, supra, at 5.

[12] 15 U.S.C. §§1, 2 (1976).

[13] 15 U.S.C. §18 (1976).

[14] Apparently all of the extraterritorial applications of antitrust law in areas relevant to export trade have been under the Sherman Act.

Also §5 of the Federal Trade Commission Act may reach conduct prohibited by the Sherman Act and the Clayton Act, as well as incipient violations of either act. 15 U.S.C. §45 (1976). The FTC Act's jurisdictional clause, 15 U.S.C. §44 (1976) is comparable to the Sherman Act's, 15 U.S.C. §§1-2 (1976). However, the application of the FTC Act to foreign transactions has been infrequent.

Identified as the "cornerstones" of American enforcement policy in international trade, the two objectives of the antitrust laws are clear and uncontestable: (1) to protect American consumers by assuring them the benefit of competitive products and ideas from both foreign and domestic sources; and (2)to protect American export and investment opportunities against unreasonable restraint or monopolization.[15] What is not clear, however, are the problems concerning jurisdiction, special exemptions and defenses associated with the application of this policy to international business.[16]

As pointed out by earlier witnesses, "[c]urrent law is murky...on whether the Sherman Act extends beyond these two policy areas."[17] Uncertainty most often arises when the operative business acts occur abroad, but the application of U.S. antitrust laws would have to be predicated on the domestic commercial effect of these acts.

A survey of the literature in this area indicates the numerous attempts to clarify the exact type of effect on U.S. commerce required before subject matter jurisdiction over foreign

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[15] U. S. Department of Justice, Antitrust Division, Antitrust Guide for International Operations 4-5 (1977). [Hereinafter cited as Antitrust Guide].

[16] Joel Davidow, "U.S. Antitrust and Doing Business Abroad: Recent Trends and Developments," Northwest Journal of International Law & Business, 1 (1979), 23.

[17] Statement of James R. Atwood, supra, at 2.

acts exists under the U.S. antitrust laws. One attempt at codification is section 18 of the Restatement (second) of Foreign Relations Law of the United States, which requires that the effects of these acts be "substantial" and "forseeable."[18] Apparently, the United States Justice Department in their Antitrust Guide for International Operations has adopted these same tests by stating that "(w)hen foreign transactions have a substantial and forseeable effect on U.S. Commerce, they are subject to U.S. law regardless of where they take place."[19] And with regard to judicial interpretations, contemporary U.S. courts have regularly held that the Congressional Intent of the Sherman Act makes it applicable even to acts committed wholly abroad, by either Americans or foreigners, if those acts have "intended and actual" or "substantial and forseeable" effects on U.S. commerce.[20]

A major exception to the general application of the U.S. antitrust laws to foreign commercial transactions is the so-called Webb-Pomerene exemption.[21]

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[18]Restatement (Second) of Foreign Relations Law of the United States 18 (1965).

[19]Antitrust Guide, supra, at 6.

[20]See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704-05 (1962); Steele v. Bulova Watch Co., 344 U.S. 280, 285-89 (1952); United States v. Aluminum Co. of America, 148 F. 2d 416,443-44 (2d Cir. 1945).

[21]Webb-Pomerene Export Trade Act, 15 U.S.C.§61-65 (1976).

The Webb-Pomerene Act, enacted in 1918, allows American companies to join together in developing foreign sales while enjoying limited immunity from the U.S. domestic antitrust laws. The current statute is administered by the Federal Trade Commission (FTC).

Unfortunately, the role of Webb associations has declined drastically over the years. From a high-water mark of about 19% of total U.S. exports between 1930 and 1935, Webb associations have slipped to less than a 2% share today.

Recently, the merits of the Webb-Pomerene Act have been reexamined by the National Commission for the Review of Antitrust Laws and Procedures. At the conclusion of this study it was the Commission's recommendation that Congress reexamine the Act, and modify it where necessary. Mr. McClory is, of course, aware of this, because he was a member of this Commission.

In enacting the Webb-Pomerene Act, Congress envisioned an eager American business community availing itself of the opportunity to pool its facilities, resources, and expertise in such a fashion as to implement an ambitious joint exporting program. As we have see that vision never materialized. One of the major reasons for the lack of development of export trading companies under the existing Webb-Pomerene Act has been the continuing uncertainty of the American business community as to what would or would not be within the scope of the Webb-Pomerene antitrust exemption.

Through the history of the Webb Act there have been a number of advisory opinions issued by the Federal Trade Commission, which in a case by case fashion has attempted to draw the parameters of the law's antitrust exemption.

Further clarification of the antitrust exemption provided under the Webb Act has been gained through adjudication of a number of cases brought by the Department of Justice.

The opinion of the court in the case of United States v. Minnesota Mining Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950), is frequently cited as one of the most authoritative interpretation of the scope and rationale of the antitrust exemption under the Webb-Pomerene Act. As stated by the Court:

> Now it may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members' competition in domestic commerce. Thus every export company may be a restraint. But if there are only these inevitable consequences, an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted.[22]

However, authorities in the field point out that this same Minnesota Mining decision may also be read as suggesting that "export cooperation among American firms is suspect, even if domestic markets are not affected and even if no American

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[22] United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950) at____.

competitors are damaged commercially."[23] In sum, restrictive interpretations have substantilly emasculated this exemption.[24]

A more recent line of judicial decisions continues to give credence to the theory that foreign businesses and consumers are within the scope of protection intended by the U.S. antitrust laws, even when the allegedly anticompetitive effects felt by them occur in foreign markets.[25] In Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), the Supreme Court held that under section 4 of the Clayton Act foreign governments have standing to sue U.S. businesses for treble damages for violations of U.S. antitrust laws. However, neither the holdings nor the ratio

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[23] Statement of James R. Atwood, supra, at 3.

[24] Compare the restrictive United States interpretation of the export exemption with the Export and Import Trade Law of Japan, Law No. 299, Aug. 5, 1952 (as amended), and the associations thereunder. When an export association is formed pursuant to articles 5 and 11, the Ministry of International Trade and Industry may require that all nonmembers also adhere to the export agreements reached by the Association members. Art. 28. Thomas E. Johnson, "The Impact of the U.S. Antitrust and Related Laws on the International Marketing of Goods and Services (Export and Import)," Northwest Journal of International Law & Business, 1 (1979), p. 121 at note 19.

However, because fundamental differences between our two societies should discourage the belief that America can or should attempt to duplicate the Japanese model for its own economy, NMTBA concurs in the belief of most trade experts that the U.S. must develop its own brand of trading company that is consistent with our nation's tradition of competitiveness rather than consensus. This we believe, is what H.R. 1648 is designed to do.

[25] E.g., Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978); Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Cases ¶62, 378 (S.D. N.Y. 1978).

decidendi of any of these decisions is particularly clear, and contrary precedents can be marshalled.[26]

Without a doubt, these expansive interpretations of the Sherman Act leave American exporters in a very confusing and unenviable position. American firms must be concerned that cooperative arrangements among themselves, intended to enhance the benefit from their export trade, might be subject to U.S. antitrust attack not only because of harmful effects in American markets, but also because of consequences felt in foreign markets by persons operating or buying abroad. The result -- export opportunities that would be beneficial to American firms and the U.S. economy are lost to foreign competitors who are not so restricted by their national antitrust laws.

V. ANTITRUST LAW MODIFICATION PROPOSALS

Having established the importance of a healthy export trade to the overall performance of the U.S. economy, and the uncertainty of application of the American antitrust laws to foreign commerce, we now focus our attention on the legislative proposals which are the basis for these hearings.

A. CERTAINTY OF THE LAW

Clearly, the underlying purpose of both H.R. 1648 and H.R. 2326 is the enhancement of U.S. exports by means of increasing

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[26] National Bank of Canada v. Interbank Card Assn., 1980-81 Trade Case ¶63, 836 (2d Cir. 1981) (Anticompetitive effects within a foreign market are not sufficient to trigger Sherman Act jurisdiction).

the competitiveness of American firms in world markets. Moreover, although H.R. 1648 is a much more encompassing approach to the problem, both H.R. 1648 and H.R. 2326 recognize the significant benefits to exporting to be derived from increased certainty in the application of U.S. antitrust laws to foreign trade. However, as is often the case, even where motives and objectives coincide, methods of achieving those objectives sometimes differ. The current debate over the relative merits of H.R. 1648 and H.R. 2326 appears to be such a case.

Although we would hasten to emphasize that we do not believe the approaches taken in H.R. 1648 and H.R. 2326 to be mutually exclusive or inconsistent, we do believe that the certification procedure embodied in H.R. 1648 would be a much more effective means of bringing increased certainty to this area than rewriting the Sherman and Clayton Acts. For this reason, although we feel that the statutory changes suggested by H.R. 2326 have merit, we fully support and strongly urge this Committee to adopt the certification provisions contained in H.R. 1648.

We firmly believe that this procedure is a necessary anticedent to an adequate degree of certainty in the international application of U.S. antitrust laws. And that, moreover, such a level of certainty is requisite to the flourishing of more competitive U.S. export trade.

We are, of course, aware of the criticisms that have been made of H.R. 1648's certification procedure. Therefore, we would like to take this opportunity to respond to those criticisms and explain why we believe that the statutory changes incorporated in

H.R. 2326 would not in themselves be adequate without also a functioning certification procedure as envisioned by H.R. 1648.

As we have previously stated, the uncertainties in this area are largely a product of broadly-worded U.S. antitrust statutes, which have spawned a progeny of case law which is often confusing and sometimes in conflict with current official Justice Department enforcement policy. A major reason for this problem . that any joint activity by U.S. trading companies shipping goods overseas may very likely have some effect on the domestic supply of those goods. There is no clear bright line delineating when the spillover has sufficient adverse effect on U.S. commerce.

To reiterate, under the Antitrust Guide it appears that current official Justice Department enforcement policy is to draw this line just short of activities that may have a "substantial direct" or "intended" effect on U.S. consumers or export opportunities. In contrast, however, the results of private antitrust litigation have not always been in harmony with official government policy. The testimony already received by this Committee during these hearings, as well as much of the other literature on this topic, is replete with illustrative examples of this problem.[27]

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[27]For example, in a recent case from the Federal Court for the Southern District of New York, Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979), the court declared that to achieve federal jurisdiction it was "probably not necessary for the effect on foreign commerce to be both

Therefore, we seriously question the idea that the best way to reduce the uncertainty surrounding the reach of the Sherman Act is to re-word this regrettably vague statute by substituting language which itself is only marginally more precise

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substantial and direct as long as it is not de minimus." Dominicus Americana is but one example of a number of cases that have applied U.S. antitrust laws where the primary impact of the business activity in question is on a foreign company in a foreign country. See Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 375 F.Supp. 610, modified in part, 388 F. Supp. 586 (E.D. Pa. 1974); Industria Siciliana Asfalti Bitumi v. Exxon Research and Engineering Co., 1977-1 Trade Cas.¶61,256 (S.D.N.Y. 1977). Statement of David N. Goldsweig, supra, at 3-4.

Another aspect of this situation which further exacerbates the problem is the large disparity in the number of cases filed by the Government as compared to those brought by private litigants. For example:

> A review of the statistics of the U.S. Courts indicates that between 1973 and 1977 the Department of Justice brought approximately fifty to sixty suits per year to enforce the antitrust laws. These suits, of course, generally relate to important issues and involve substantial companies. As a result, their influence in formulating antitrust precedent is much greater than the mere number of suits.
>
> On the other hand, between 1973 and 1977 approximately 1100 to 1300 private antitrust suits per year were brought in the Federal Courts or about twenty times the number of Government suits.

ABA Antitrust Section, Antitrust Law Developments 99 (2d Supp. 1979), as cited in Johnson, supra, at 124-25.

The above quote, of course, emphasizes that business counsel must constantly be aware of the standards applied in private actions, regardless of how favorable existing antitrust guidelines may be. Moreover, counsel must also be aware that these guidelines only reflect current Justice Department enforcement policy and are, of course, subject to change.

than that already in the law, and which additionally suffers from the lack of any, (either judicial or administrative) interpretative history.

Such a tabula rasa approach may in some circumstances be desirable. However, we believe that in the current context, while some existing interpretations would surely be viewed as relevant to the new statutory language, the perception if not the fact, would undoubtedly be that of a "clean slate" upon which most U.S. exporters and their counsel would, with good reason, draw an even larger question mark than the one that already exists in their minds concerning this subject. And while some have criticized H.R. 1648's certification procedure as creating a "patch-quilt" of exemptions, we would suggest that a better example of such a "patch-quilt" effect is that which we have under the current law (with a myriad of judicial and administrative interpretations of statutory law which itself was likely thought to be adequately clear when it was enacted,) or that which would result under new statutory terminology which would itself be subject to this same interpretative process de novo.

Finally, although it can be argued that all areas of the law, not just antitrust statutes, are subject to this kind of common law development, we would again point out that because of the distinctiveness of the problem of international commercial competition, this is an area of the law which should enjoy more than the average degree of certainty. Indeed, even those who oppose H.R. 1648's certification procedure have testifed before this Committee that it is upon the basis of "considerable experience" that they make the judgement that "there are few activities which will increase exports which cannot safely be done insofar as American Law is concerned."[28]

Mr. Chairman, we believe that these witnesses have made our point perhaps even better than we ourselves can. Indeed, it is apparent in many instances that only antitrust counsel with "considerable experience" are capable of rendering adequate legal interpretations of this complex body of law. Unfortunately, most businessmen who run the average small to medium-sized firm are not experienced antitrust lawyers, nor are most able to afford such specialized legal counsel. However, the vast majority are justifiably fearful of accidentally violating the U.S. antitrust laws, and, therefore, forfeit potentially lucrative export opportunities rather than run this risk.

In light of this background, we strongly recommend enactment of the certification procedures contained in Title II of H.R. 1648. We recognize and completely support the prevailing sentiment toward reducing, to the maximum extent possible, government regulation of our free-market economy. Moreover, we firmly believe that H.R. 1648's certification procedure is actually in harmony with this objective and is not, as has been suggested by some of the bills

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[28]Statement of James A. Rahl, *supra*, at 5. Additionally, Professor Rahl at page 7 of his statement cites at least several recent common law developments in this area of the law which would pose difficult interpretive problems even for as experienced an antitrust scholar as himself.

detractors, a bureaucratic apparatus which would confer antitrust immunity at an uncertain cost in government red tape and possible anticompetitive domestic effects.

It is important to remember that the courts of the judicial branch of government, although not usually thought of as regulatory bodies in the sense of the executive branch or independent agencies, nevertheless do exercise enormous regulatory authority over the commercial practices of our economy. And as we have already discussed, this authority is often applied in a very inconsistent and uneven fashion, which becomes even more confusing when combined with sometimes conflicting executive branch enforcement policy.

Therefore, we believe that the certification procedure of H.R. 1648 will be a major step in helping to relieve the burden of uncertain regulation now shouldered by American firms that desire to be active in the export market, while at the same time providing very adequate protection against unwanted anticompetitive domestic effect. Moreover, by relieving this burden, it will especially help those small and medium-sized businesses which many are convinced have the greatest potential for making a significant contribution to our volume of export trade. And isn't making the American economy more efficient, by eliminating needless restraints and expense, and internationally more competitive the real goal of regulatory reform anyway.

B. ADMINISTRATION AND ENFORCEMENT

Opponents of H.R. 1648 have further criticized the bill's certification procedure as being unnecessary, by arguing that

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where genuine uncertainty presently exists, current Justice Department procedures allow potential exporters to ask the Antitrust Division for a Business Review. In the past, these reviews have often been slow, complex and costly, so that lawyers frequently have advised against their use,[29] Nevertheless, H.R., 1648's opponents assert that this procedure (as revised during the last Administration)[30] should be given more extensive use before a new certification procedure is implemented. Although on the surface this sounds quite reasonable, might it not be prudent to first ask why this business review procedure, even as modified to expedite foreign trade activities, has been used so little.

Although the Department of Justice does not issue advisory opinions (unlike the Federal Trade Commission, hereinafter FTC),[31] "under its Business Review Procedure the agency, through

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[29]Statement of James A. Rawl, supra, at 6.

[30]CCH Trade Reg. Rep. ¶8559.40 (announced Dec. 6, 1978). Although this new policy was designed to expedite export-related business review requests, it must also be noted that none of the requirements or conditions relating to the scope of protection afforded by such a review (28 C.F.R. 50.6) was changed or modified by this announcement.

[31]According to CCH Trade Reg. Rep.¶9731:
"[A]dvice on a 'proposed course of action' may be requested from the FTC. [Moreover,] Commission policy is to consider the advice and, if practicable to inform the requesting party of the agency's views, via an advisory opinion." However, it should also be pointed out that this advice "does not bar the FTC from reconsidering the questions involved and rescinding or revoking the advice."

the Antitrust Division," may indicate its 'present' antitrust enforcement intentions with respect to a proposed course of action submitted by a business, industry group or other enterprise.[32] However, unlike the action-forcing provisions of §206 of H.R. 1648, which require the Secretary of Commerce to either issue, amend or deny a certificate within a fixed period of time after review of a request, under the Justice Department's Business Review Procedure, the Antitrust Division may or may not state its present enforcement intention with respect to the proposed business conduct.[33]

Moreover, a business review letter states only "the enforcement intention of the [Antitrust] Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required in the public interest."[34] And, although the Justice Department has never brought a criminal action contrary to a previously expressed opinion, where there has been full and true disclosure at the time of presenting the Business Review letter request, the completely discretionary nature of this procedure continues to re-enforce the uncertainty of potential exporters.[35] In contrast, under the proposed provisions of §206 (d) of

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[32]CCH Trade Reg. Rep ¶8559

[33]Id.,¶8559.10

[34]Id.

[35]Id.

H.R. 1648 the Secretary of Commerce would be able to modify or revoke an Export Certification only for cause, and only after an opportunity for a hearing pursuant to §554 of title 5, United States Code.

Once again in contrast, the certainty of the scope of the antitrust exemption provided by the certification procedure of H.R. 1648 far exceeds that afforded by the Justice Department procedures just described. Specifically, H.R. 1648 §206 (6) ensures that:

> The subsequent revocation or invalidation in whole or in part of such certificate shall not render an association or its members or an export trading company or its members, liable under the antitrust laws for such export trade, export trade activities, or methods of operation engaged in during such period.

Closely allied with the previous issue are the questions; (1) who would have standing to sue an export trading company or an export trade association for an alleged violation of its export trade exemption; and (2) what would be the measure of damages for such a violation?

With respect to standing, under the present law a favorable response in a Justice Department Business Review letter offers no protection from either the Government or private litigants bringing suit against an exporter. However, under §206 (e)of H.R. 1648, apart from the complainer against activity being ultra vires the certification, "[n]o person other than the Attorney General or [FTC] shall have standing to bring an action...for failure...to meet the eligibility requirements of [the] act."[36] We fully support this provision, particularly in light of the confusion which the decisions in private litigation have brought to this area.

Concerning the measure of damages in such suits, under present law exporters who are found to have exceeded their export antitrust exemption are potentially liable for treble damages. Still more troubling is the fact that such damages may even relate to a period of time during which the defendant firm was operating under what it then relied on as being authoritative government enforcement policy as stated in a Business Review letter. House Bill 1648, on the other hand, would very equitably and sensibly limit such damages to the amount of actual injury suffered during the time in which the defendant firm acted outside the boundaries of its certification.

Finally, there is the issue of which government agency should be charged with the responsibility of administering this program of antitrust export exemptions. Under current law, although the FTC has responsibility for administering the Webb-Pomerene export exemption, the Department of Justice may also prosecute firms for what the Antitrust Division considers to be a violation of that exemption. And, unfortunately, the enforcement of these two agencies has not always been uniform.

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[36] H.R. 1648 §206 (e) (3).

But perhaps even more significantly, this arrangement has been a serious deterent to the broader utilization of the Webb-Pomerene exemption, because of what has been perceived by the business community as the Justice Department's, as well as the FTC's hostility toward such foreign commerce antitrust exemptions.

For this reason, we strongly support H.R. 1648's approach of placing primary responsibility for administering the export antitrust certification procedure in the Department of Commerce, in consultation with both the Justice Department and the FTC. We believe that this arrangement will enable many U.S. businesses to begin to overcome their natural reluctance to utilizing the export certification procedure for fear that it will only serve to make them a target for Justice Department inquiries concerning their activities that may "spill over" into the domestic market. At least one previous witness has suggested that there may already be some empirical evidence of this phenomenon in the infrequent use of the Webb-Pomerene exemption.[37] We would agree with this assessment.

Critics of vesting administration of the certification procedure in the Commerce Department have asserted that "since the Justice Department and the FTC are more sensitive to and familiar with the antitrust issues that will be raised by applications for an antitrust exemption under the Act...<u>those antitrust</u>

[37]Statement of David M. Goldsweig, <u>supra</u>, at 5.

agencies, [the emphasis here is that of the source to which we refer, not our own, although we do agree] not the Commerce Department [should] be made responsible for conducting [the] regulatory process ...ultimately provided by Congress.[38]

Indeed, we totally agree that these "antitrust agencies" do focus much more heavily upon the antitrust implications of potential cooperative exporting ventures -- that is exactly our point! We do not for a moment doubt the legitimacy of this concentration for these two trade regulation enforcing agencies. Obviously, this is the job that they were designed to do. What we do question, however, is the wisdom of assigning the program of export antitrust exemption certification, which has as its fundamental purpose the fostering of joint export ventures, to an agency or department that has an inherent bias against such activities generally. And there is little doubt that such a bias does exist as was quite clearly pointed out by former Assistant Attorney General John H. Shenefield (who was in charge of the Antitrust Division during the Carter Administration) when he testified before this Committee that a business review procedure conducted by the Justice Department would focus much more heavily on antitrust issues, whereas, a certification procedure administered by the Commerce

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[38]Statement of A. Paul Victor, supra, at 9.

Department would resemble more of a balancing of export trade concerns with potential antitrust issues.[39]

We could not have made the point any better ourselves. But to view the kind of balancing of competing export and antitrust interest described by Mr. Shenefield as a bad method of making U.S. policy in the vital area of U.S. international economic performance is to completely misunderstand the raison d'etre of export trading company legislation.

C. ANALYSIS OF H.R. 2326

We are aware that because the language of H.R. 2326 closely tracks the enforcement policy of the Justice Department as expressed in its Antitrust Guide, some have argued that H.R. 2326 would not bring about any drastic changes in the enforcement of the U.S. antitrust laws. However, as we have already stated, we find it hard to refute the fact that the natural tendency to litigate the meaning of the new statutory language proposed by H.R. 2326, will undoubtedly give rise to a degree of uncertainty in itself.

Therefore, in order to minimize such additional confusion, we would suggest several modifications to the language of H.R. 2326 should it be adopted by this Committee.

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[39] Oral remarks of former Assistant Attorney General John H. Shenefield (Antitrust Division) in response to question by Representative Robert McClory during April 8, 1981, House Judiciary Committee Hearing on H.R. 2326 and related legislation.

1. <u>The Pfizer Problem</u>

First, in response to what is known as the "Pfizer Problem"[40]--i.e., the ability of foreign entities or sovereigns to sue American companies in U.S. courts for restraints of trade in foreign markets -- we recommend that the language of H.R. 2326 be amended to make it clear that effects occurring only within foreign jurisdictions do not provide a basis for antitrust jurisdictions by themselves, or even when aggregated with alleged domestic effects.

2. <u>Forseeability</u>

Our second concern centers on H.R. 2326's use of the phrase "direct and substantial" as it relates to the Justice Department's current position that only "forseeable" effects on U.S. commerce be subject to U.S. antitrust jurisdiction. While we fully support the Antitrust Divisions's view, it is unclear whether the concept of forseeability is contained in H.R. 2326's phrase "direct and substantial." Therefore, we recommend that the term "forseeable" be added to this phrase in Section 7 of the Sherman Act as amended by H.R. 2326.

3. <u>FTC Act</u>

Although historically the FTC has not shown much interest in scrutinizing the foreign activity of U.S. firms or the activity of foreign companies that may affect domestic U.S. commerce, this attitude may be changing. Therefore, we believe it would be prudent to provide a similar amendment to the FTC Act that would parallel the language of H.R. 2326 in amending the Sherman Act.

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[40]Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978)

VI. CONCLUSION

As we have repeatedly emphasized throughout our testimony, export trade is no longer an expendable luxury, but rather is a vitally important component of a healthy U.S. economy. Therefore, it is imperative that the United States do all that it can to encourage exports. Indeed, the recent successful completion and ratification of the Multilateral Trade Negotiations (MTN) appears to be evidence that this fact of modern global economic life is gaining wider recognition and understanding. Moreover, the MTN and other recent export related initiatives are a direct reflection of America's continued commitment to removing governmental restraints on trade, thus enhancing the freedom and fairness of the world trading system.

One major factor in promoting fairness in foreign trade is for all international commercial competitors to play by approximately the same rules. In this regard, we have today stated our concern that American exporters may be severely handicapped in the international arena by the uncertainty engendered by the confused and confusing state of U.S. Antitrust Law. However, we are also very gratified to note that our appeals have not fallen on deaf ears. To the contrary, we commend you, Mr. Chairman, and Mr. McClory for your appreciation of this problem, and for your efforts to bring a greater degree of certainty to the foreign application of U.S. trade regulations. But as we have previously stated, although our objectives are the same, our views on achieving those goals are slightly different.

We firmly support and strongly urge the enactment of the antitrust exemption certification procedure contained in H.R.

1648, as being the most effective way of alleviating the current export-inhibiting uncertainty of our antitrust laws. We would, however, again state that we do not believe H.R. 1648's certification procedure to be exclusive of, or inconsistent with what we consider to be the potentially helpful modifications of the Sherman and Clayton Acts proposed by H.R. 2326

We are realistic enough to know that none of these proposals, either separately or jointly are a panacea for all of America's balance of payment ills. But, we do believe that working together, the reforms envisioned by these two bills can be a powerful incentive for American businesses that have to this point been understandably reluctant to engage in joint exporting ventures.

Clearly, Mr. Chairman, the time to act is now! Although we do not object to Congressman McClory's Bill H.R. 2459, which would create a commission to study the effects of the extraterritorial application of U.S. antitrust laws generally, we, nevertheless, believe that more than sufficient information and expertise currently can be called upon to enable this Congress to write good legislation in the specific area which we have addressed today. We would, of course, support as entirely appropriate a future review of the functioning of whatever legislation you may author at this time.

As with any legislation, there will be an inevitable lag time between the enactment of export trading company measures and the actual realization of their intended effects. Therefore, the faster you act, the sooner the American economy will experience the beneficial effects of your action. Thank you.

National Association
of Manufacturers

LAWRENCE A. FOX
Vice President and Manager
International Economic Affairs Department

June 24, 1981

The Honorable Peter W. Rodino, Jr.
Chairman, House Committee on Judiciary
2462 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

First I should like to thank you for your letter of May 18, which was a response to mine to you of May 4. As I have said earlier, NAM strongly supports the export trading company legislation embodied in H.R. 1648 and in the Senate-passed S. 734. We welcome the initiative you and Mr. McClory have taken in introducing H.R. 2326, the "Foreign Trade Antitrust Improvements Act of 1981."

I was pleased to receive the invitation your Subcommittee extended to testify today on H.R. 2326 and related matters. Unfortunately, I was unable to take advantage of this opportunity becuase of a previous commitment. Should you hold further hearings, I would be very happy to testify. In any event, I would be grateful if the testimony I prepared for this morning's hearing could be included in the record.

It is not necessary to recapitulate here all that is contained in the statement. NAM continues to support passage of the "Export Trading Company Act of 1981," (H.R. 1648). We do so because we believe this bill could help improve U.S. international competitiveness. As to the antitrust provisions of H.R. 1648, it is our view that certification by the Commerce Department provided for in H.R. 1648 and Senate bill S. 734 is essential to meaningful export trading company legislation. The Rodino-McClory bill, if made a part of Title II of H.R. 1648, would make it a better piece of legislation. Alone, however, the Rodino-McClory bill in its present form does not provide the kind of antitrust reassurance which is needed if the objective is an increase in cooperation among American exporters for the extremely difficult and expensive endeavor required to succeed in a major way in world markets.

Our reasons for these views are given in some detail in the attached statement. In submitting this statement, I should like to thank you again for the work you have done in this important area. If the export trading company legislation can make a contribution to this country's exports--and we believe it can--then it is important for Congress to act as expeditiously as possible. American business opinion is overwhelmingly in support of the export trading company concept. Legislation on this subject has been before the Congress for more than two years, and the issues have now been sorted out. We know that you agree that now is the time to act.

Sincerely,

Lawrence A. Fox

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STATEMENT OF
LAWRENCE A. FOX
VICE PRESIDENT, NATIONAL ASSOCIATION OF MANUFACTURERS
FOR INCLUSION IN THE RECORD OF THE HEARINGS
BEFORE THE
HOUSE JUDICIARY COMMITTEE'S
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW,
CONCERNING
THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1981
AND
THE EXPORT TRADING COMPANY ACT OF 1981
June 24, 1981

Mr. Chairman, members of the Committee, I am Lawrence A. Fox, Vice President for International Economic Affairs of the National Association of Manufacturers. NAM firmly believes that the export trading company legislation now before this committee can make a positive contribution to our country's trade performance and hence to our overall economic strength. We therefore welcome the opportunity to present our views today.

The National Association of Manufacturers is a voluntary, non-profit organization of approximately 12,000 companies large and small. Our members are in every state of the union, and collectively they account for over 75% of U.S. industrial output.

We at NAM are convinced that this nation faces a serious trade problem. Our first task is to understand it and the second is to take those measures necessary to correct it. The nature of the problem is such that no single policy adjustment will suffice. It would be wrong to view export trading company legislation as a panacea for the American trade problem. That it cannot be, but it can make an important contribution. Before commenting in further detail on export trading company legislation and those portions of it which are the special concern of this committee, I should like to discuss the trade problem itself.

In the nature of things, we are far more aware of our imports than our exports. We see imports on the highways, in retail outlets and at the gasoline pump. The country is less aware of its exports. There is a sense in which the polity may be likened to a child with first-hand knowledge of the toys and books he has and wants but only a dim perception of the source of the income that pays for them. This partly explains our failure to develop an effective export policy to insure that we can indeed pay for our imports.

The U.S. Government has had at least five identifiable export expansion programs or "drives" since the early 1960s--with little or no discernable results. In part this was the case because the country did not believe that trade mattered very much. That changed in 1971 when the United States ran its first trade deficit of the 20th century. As you know, the last five years have seen a string of serious trade deficits: from minus $5.9 billion in 1976 to minus $24.6 billion in 1979 and a somewhat improved minus $20.3 billion in 1980. The escalation of energy prices following the 1973 OPEC oil embargo is frequently blamed for these deficits, which are of course merely quantifications of the fact that we are unable to pay for our imports. Yet that feat can hardly be regarded as impossible. It has consistently been accomplished by Germany and Japan, countries which are far more dependent upon imported oil than are we. (In 1979 Japan imported 75% of her energy needs and Germany 51% as against only 21.4% for the United States.)

The point to appreciate is that if the United States finds itself in a new and more difficult position with respect to international trade, higher oil prices are not its most important element. Rather, what we need to focus on are the enormous strides in competitiveness that our chief international trade rivals have taken in the last two decades and the relative decline of our own. If, for example, the United States had maintained its 1970 share of the world market for manufactured goods (20.4% as against 17.4% in 1979), it would have meant an additional $26 billion in our manufactured trade surplus in 1979, and somewhat more than that in 1980. Thus, had we merely held our ground in exports, there would have been no trade deficits.

We cannot reverse the trends of the last decade without at least recognizing both the need to do so and the fact that the future economic strength of the United States will depend in large measure on its own international competitiveness. The export trading company legislation now before you, though hardly a full export policy in itself, is nevertheless a recognition that we must change our institutional or business structures if American industry is to become truly competitive internationally.

This legislation has two basic elements: banking provisions and antitrust provisions. The banking provisions, by permitting banks to invest in export trading companies, give the firms that form such companies access to the expertise on foreign markets which many banks possess and to the financing that is crucial to success in so many export ventures. The antitrust provisions should enable potential exporters to form associations among themselves without fear of running afoul of the antitrust laws. An export trading company statute needs both of these elements.

I realize it is the antitrust provisions which are the special concern of this Subcommittee and the focus of these hearings. NAM has long supported export trading company legislation, and has specifically endorsed the provisions of Senate bill S. 734, which, having passed the Senate in April, is now before you. Naturally, we were pleased to learn that the Assistant Attorney General for Antitrust, Mr. William Baxter, endorsed this bill. He gave this endorsement on June 17 in a hearing before the Senate Judiciary Committee. We are aware that at the same time Mr. Baxter and Mr. Unger, the General Counsel of the Department of Commerce, suggested that the certification procedures of the Senate-passed bill be amended to require greater scrutiny by the Department of Commerce when the applicants for certification account for 50% or more of the U.S. market. While

NAM may not feel that this amendment is necessary, we appreciate the antitrust concerns of the Administration which inspired it and have no objection to it. Thus, we fully support both the objectives of the Administration and the means chosen by Justice and Commerce to accomplish them.

Former FTC Chairman Earl Kintner dedicated his book An Antitrust Primer, "To the perplexed businessman--who must always obey the law without always knowing what the law is." We have reason to take this light-hearted comment very seriously. In a survey conducted by NAM's International Department in 1974, for example, 70% of the businesses who responded indicated that antitrust uncertainty was an important problem for them. A more recent, 1978 survey of U.S. businesses in East Asia by the State Department and the eleven American Chambers of Commerce in East Asia reinforced this finding. Respondents in that survey listed U.S. antitrust laws as the second most significant impediment to business out of eleven inhibiting policies noted in the survey. Any effort by Congress to clarify antitrust law, much of which is case law, and so lessen this uncertainty, is welcome. We are encouraged by the efforts of Chairman Rodino and Mr. McClory in introducing their bill, H.R. 2326, which is designed to do just this. We believe that the language of this bill, "The Foreign Trade Antitrust Improvements Act of 1981", would add weight to the antitrust provisions of the export trading company legislation by clarifying Congressional intent. There is, however, an irony here, indeed a danger, which we need to address. Neither H.R. 2326 nor the export trading company legislation is at all likely to affect significantly competition within the United States, and H.R. 2326 alone is not sufficient to alter business behavior or inspire confidence in the manner intended. The danger is that in straining at the gnat of antitrust perfection, Congress could fail in its purpose of fashioning law that will encourage the growth of export trading companies.

A certification procedure of some sort is necessary. The business review letters and "not-to-worry" assurances from the Justice Department are not enough. They have not inspired confidence in the past and are unlikely to do so in the future. In the absence of certification, would-be ETC participants will not make the kind of commitment they need to make in order to succeed in the export market.

At this point, it is necessary, in accordance with the wishes of the Subcommittee, to discuss the so-called staff draft of the Rodino-McClory bill and to compare it with the language supported by the Administration and contained in S. 734 and H.R. 1648. Insofar as the staff draft essentially repeats the language of H.R. 2326, we support it. Indeed we believe that the inclusion of the concept of foreseeability in the amendment to Section 7 of the Sherman Act improves H.R. 2326 as introduced. However, we see no reason to prefer the language of the staff draft, which authorizes the Justice Department to issue certificates of review to the Commerce Department certification procedure provided for in the Senate-passed export trading company bill.

As I have explained, we believe that a certification procedure is an essential part of this bill. We further believe it is likely to be most effective, i.e., to encourage export trading companies and to increase U.S. exports, if it is administered by the Department of Commerce. It is a matter of public record that the Department of Justice supports the idea of the Commerce Department taking on this role. It is evident that the Department of Justice would in fact rather not be burdened with regulatory responsibilities. Moreover, the allocation of the certifying responsibility contemplated by S. 734 is fully consistent with past practice. As then Under Secretary of Commerce Luther Hodges noted in Senate testimony in September of 1979, "other antitrust exemptions, such as those for agricultural co-ops, and air, ocean, and surface transportation, are administered by the agencies concerned with the subject matter of the exemption, not the antitrust enforcement agencies." The export trading company legislation instructs the Secretary of Commerce to "promote and encourage the formation and operation of export trading companies." Without the ability to speak authoritatively about the antitrust policies affecting ETCs, his ability to discharge that obligation satisfactorily would be severely limited.

Ensuring the role of the Commerce Department in this important area is, for NAM and its members, the principal consideration leading to our support for Title II of the export trading company bills over the staff draft. Other comments can be made. In criticism of the staff draft, I would point out that because it establishes a procedure, which the drafters admit is designed to be used only in extreme cases, it gives the business community little but additional uncertainty. Section (2)(d) of Title II of the staff draft states that, "The failure of the Attorney General to issue a certificate of review shall not be admissible as evidence in a subsequent administrative or judicial proceeding relating to the conduct specified in the application for such certificate of review." This reassuring language notwithstanding, the existence of a certification procedure would inevitably raise questions about the failure of a company to use it. These questions would occur to Justice Department officials whether or not they could be raised in court. Yet by setting a fairly rigid and enigmatically brief standard for certification (i.e. the conduct is not likely to violate the antitrust laws of the United States), the law discourages the use of the procedure it creates.

We are aware that the proposed Commerce Department certification procedure has been criticized as too bureaucratic and time-consuming and that it allegedly imposes an unnecessary burden on the business community. Our answer is that ninety days is not too long to wait for the assurance that one's proposed conduct is "exempt from the operation of the antitrust laws with respect...(to) export trade". No businessman has ever raised this point with NAM; quite the opposite. The time spent is little enough for the certainty achieved. As for bureaucracy, the 10 or 15 people it would take to administer the Commerce Department certification procedure is not a serious "proliferation of government" -- Mr. Baldrige has said he could carry out the certification responsibilities with existing resources. Most assuredly, the so-called burden of the bureaucracy envisaged in the export trading company legislation would be far lighter than the burden of uncertainty now borne by the business community.

Though these comments have with good reason focused primarily on domestic law, there are other reasons for proceeding with the proposed Commerce Department certification scheme. Mr. Joel Davidow, previously chief of the Foreign Commerce Section of the Justice Department's Antitrust Division, testified last week on the various bills now before the Congress in this general area. In his discussion of S. 734 and the certification procedure it contains, he suggested that, to the extent that a U.S. export trading company could be construed to be a cartel, it might encounter less difficulty internationally, specifically in the European Community, if it had the explicit sanction of the U.S. Government, expressed in a certificate. In advancing this particular argument in favor of certification, we would note that in our view it is extremely unlikely that a U.S. export trading company would ever actually possess cartel power.

Additionally, we would ask the Subcommittee to bear in mind that certification under Title II of S. 734 and H.R. 1648 requires annual reports by each export trading company. Commerce or Justice may require still further information from

from any ETC whose annual report raises antitrust or anti-competitive questions. The export trading company bills also require the Secretary of Commerce to report periodically to the Congress on the operation of the ETC program, including the certification scheme. In short, there is ample provision for Congressional oversight and ample opportunity for Congress to assure itself that ETCs are not operating to the detriment of a competitive market in the United States or the objectives of the U.S. antitrust laws.

Finally, I would like to address the suggestion put forward by some observers that the legislation now being considered by this Committee would have a deleterious effect on U.S. efforts to persuade other countries to adopt and enforce antitrust laws similar to our own. Let us accept for a moment the proposition that U.S. antitrust laws need no amending, only emulation by other countries. It does not necessarily follow that this criticism of the proposed legislation is justifiable or correct. Some accommodation to reality is necessary if we are to compete successfully.

I should like to take as an illustration of this point an example from another aspect of international trade, namely the current export credit war among industrial countries. Without discussing our own Eximbank policies, I would note that the British response to French intransigence in the OECD negotiations was (1) to denounce it and (2) to beef up their own export credit facility. And whatever the British think of OPEC, their North Sea oil prices follow suit.

We are not today discussing a proposal to create trading companies to rival the Japanese sogo-shosha. In talking about the limited proposals before the Subcommittee, however, we should not lose sight of the fact that our exporters must compete with these giant trading companies. The United States is still a very strong and powerful country, but not so strong that we can afford to reduce American export competitiveness for insubstantial reasons.

The legislation under discussion today involves two broad policy areas: competition policy and trade policy. In fact, export trading companies pose no threat to competition policy in the United States or overseas. On the other hand, increased exports can directly benefit the American public through the contribution they make toward increased employment and a stronger dollar. We believe that an export trading company bill such as H.R. 1648 would contribute to an increase in U.S. exports, and we urge the Subcommittee to act favorably upon it.

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STATEMENT OF

JOHN F. MCDERMID

GENERAL COUNSEL

INTERNATIONAL BUSINESS GOVERNMENT-COUNSELLORS, INC.

BEFORE THE
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 2326
THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT
OF 1981

JULY 1, 1981

Brussels • Geneva • New York • Ottawa • Paris • Tokyo

I. INTRODUCTION

My name is John F. McDermid and I am General Counsel and Government Relations Counsellor for International Business-Government Counsellors, Inc., a private international government relations counselling firm with headquarters in Washington, D.C.

My previous experience includes: Attorney-Advisor, U.S. International Trade Commission; Attorney, Bureau of Competition, Federal Trade Commission; and Assistant General Counsel, National Association of Manufacturers. While at NAM, I testified before the Senate Subcommittee on International Finance on various export trade association proposals (i.e. S.864, S.1499, and S.1663).

I have authored several law review articles on international trade and foreign antitrust issues, including an article on the President's 1979 Antitrust Commission review of the Webb-Pomerene Act (Webb Act).[1] I have long been concerned that U.S. antitrust laws are formidable obstacles for American companies operating abroad.

II. RECOMMENDATION

I endorse the good intentions behind HR 2326, the

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1. "The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment," 37 Wash. and Lee L. Rev. 105 (1980).

"Foreign Trade Antitrust Improvements Act of 1981", which, amongst other things, seeks to introduce a less complicated alternative to an export trading company antitrust certification procedure. However, the proposal will not -- without numerous changes -- respond to the needs of U.S. firms wishing to defray their costs and increase economies of scale by collectively seeking to enter the export market.

In this regard, Title II of HR 1648, the Export Trading Company bill is a far preferable route for legislative action. Therefore, I strongly urge the Committee to adopt HR 1648 in lieu of HR 2326.

III. REASONS FOR RECOMMENDATION

A. My criticisms of HR 2426 are based principally upon the following:

1. HR 2326 fails to even acknowledge that its primary purpose is to increase U.S. exports by helping U.S. firms better compete in the increasingly competitive world market. Unless the export promotion intent is made clear, the overall policy which is being sought may not be implemented by the U.S. government agency monitoring or administrating the antitrust exemption. Findings to this effect should be in-

cluded in any initiative such as HR 2326.

2. HR 2326 fails to give adequate antitrust protection to enterprises seeking to cooperate jointly for export purposes. HR 2326 goes nowhere near that protection afforded enterprises under HR 1648, the Export Trading bill.

3. By concentrating half of its efforts to amending Section 7 of the Clayton Act, HR 2326 misses what is in fact really needed in terms of legislation by the U.S. business community to operate collectively for export purposes. The primary inhibiting factor to joint activity in export trade <u>is not</u> the uncertainty as to the types of effects on interstate trade that must be shown in order to establish U.S. antitrust jurisdiction over an international transaction. Thus, whether Congress legislates the standard to read "directly and substantially affects U.S. commerce" or "direct, substantial, and forseeable," or some other formula for judging illegality is <u>not</u> the burning issue. Rather, U.S. business enterprises are more concerned with the question of whether <u>any</u> kind of concerted action in export trade will be prosecuted either by the U.S. govern-

ment or by private parties.

This is not to say it isn't laudable that Congress may want to legislatively standardize the effects doctrine. But such an amendment will not address the real and central problem that exists. Moreover, even with Section 7 amended as proposed under HR 2326, U.S. firms will still not be able to predict with any assurance whether their conduct will have a "direct, substantial, and foreseeable" effect on U.S. interstate trade. This determination is, after all, a factual question which is frequently very complex.

B. Possible Certification Procedure for HR 2326

A meaningful certification procedure must be available for U.S. firms, or they cannot be expected to take advantage of any antitrust exemption for exporting.

If the Committee fails to embrace Title II, HR 1648, it should amend HR 2326 so as to provide a "meaningful" certification procedure which would include the following:

1. Remove the Justice Department as the sole or even primary decision-maker for assessing the legality of the joint conduct. Instead, the responsibility

should be within the Commerce Department, the lead U.S. government export promotion entity.

If the Justice Department must be the administrator of the antitrust exemption, Congress should provide that Justice could not make any final decision as to the legality of the cooperative export arrangement without concurrence of the Commerce Department. In this way, a balance between the loss to competition against the gain to exports could be achieved.

2. Remove <u>any</u> possibility of private action, whether single or treble damages, unless the firms operating under the certification umbrella are found by the Justice Department to be operating beyond the granted certification. In this regard, however, U.S. firms should be given an opportunity to correct whatever abuses may be found before private actions may be brought.

3. Expand the scope of the term "joint venture." Under the present Webb Act and under Title II, HR 1648, firms are provided broad latitude to cooperate jointly for export purposes, therefore their activities are not limited to only "joint venture" relationships. There may be many reasons why U.S. firms would rather get together to export other

than through legally created joint ventures. For example, companies may not find it necessary or even desirable to enter into a joint venture when their only purpose for cooperating with one another is to defray marketing expenses. To this point, former President Carter, in his September 26, 1978, export policy message, noted that

> There are instances in which joint ventures and other kinds of cooperative arrangements between American firms are necessary or desirable to improve our export performance. (Emphasis added)

In this regard, one of the principal purposes behind HR 2326 should be to allow exporters to achieve greater efficiencies through joint marketing so that they may offset some of the high costs incurred by international exporters who wish to enter foreign trade. Without an antitrust exemption, companies are terrified, for antitrust reasons, over any kind of inter-corporate cooperation, even if only for marketing purposes.

C. Justice Department Should Be Removed as Prime Decision-Maker

The apparent intent behind HR 2326's amendment to the Clayton Act, Section 7, is to provide exporters a simple and easily understood antitrust exemption for concerted action in export trade which would promote

U.S. exports, a change that is recognized in the following quote:

> For many years the manufacturers in this country have felt the need of passage of this bill in order to clarify their rights in the foreign export trade.

These were not the remarks of any present day member of Congress, but rather a 1917 statement of Senator Pomerene, one of the key sponsors of the present Webb Act (Cong Rec 2785 (1917)).

The obvious question is why was the Congressional intent never realized and therefore why hasn't the Webb Act really increased exports? One of the principal reasons lies in the fact that Congress placed Administration of the Webb Act with the antitrust authorities rather than with those government policymakers committed to enforcing an export promotion policy and because the thought of cooperative arrangements in export without the protection provided by the Webb Act was too risky for firms to undertake.

Since 1945, the Justice Department was given judicial approval to carry out possible Webb Act violations without waiting for the Federal Trade Commission (FTC) to conduct a section 5 "readjustment hearing", which permitted Webb Associations to readjust their business so as to comply with the law. With Justice essentially preempting the FTC, companies that may have been interested in the trading advantage of the export exemption did not do so for fear of possible criminal prosecution and/or treble damage private actions.

Perhaps due to a realization that Justice was reluctant to defer to the Webb exemption, the Minnesota Mining Court chastised Justice when it stated that:

> The courts are required to give as ungrudging support to the policy of the Webb-Pomerene as to the policy of the Sherman Act. Statutory eclecticism is not a proper judicial function.[2]

Moreover, the Justice Department's bias against Webb Associations, and against non-Webb Act cooperative export transactions, (and therefore bias against implementing a proper balance between antitrust principles and export promotion) is seen in the role it played in examining the Webb Act in the President's National Commission for the Review of Antitrust Laws and Procedures (the Commission).

A close examination of the Commission's record and its findings reveal that -- as a direct result of the Department's leadership role in that Commission and predictable institutional bias towards antitrust enforcement policies -- (as compared for example, to export promotion) -- much of the Webb-Pomerene analysis was both factually incorrect and wholly misleading.

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2. United States v. Minnesota Mining and Mfg. Co., 92 F Supp. 947, 965 (D. Mass. 1950).

As a result, in the absence of the Presidentially appointed Business Advisory Panel's affirmative findings, the commission would likely have recommended repeal of the Webb Act.

It is more than reasonable to expect -- based upon the above history of the Department _vis a vis_ the Webb Act -- that it will continue to be antagonistic towards _any_ departure from purely competitive, free market doctrines. This is not, after all, surprising since the Department has an institutional mandate to assure that this country's antitrust laws and principles are fully implemented.

Accordingly, unless U.S. firms are given some clear assurances -- preferably through a certification procedure -- that their cooperative action will not be subject to an unexpected U.S. government (or private party) prosecution, Congress should expect that the antitrust exemption will not be taken advantage of and that we will be right back to the situation we are witnessing and have witnessed under the present Webb Act.

'. _Need for Exemption_

A. _Antitrust As "Real" Impediment to Export Trade_

Many witnesses before this Committee and elsewhere have argued that there is only a business community "perception that this country's antitrust laws are an impediment to export trade.

It is more than a "perception problem". There is a real fear that what may be done collectively for export may be unlawful. Examples in support of this are as follows:

1. Justice Department's Attitude Towards Cooperative Arrangements for Export

The Antitrust Division's attitude towards collective export arrangements and whether they may be lawful depends upon the policymakers in charge, which in turn results in confusion as to whether certain conduct is lawful or not. For example, imagine the reaction of established Webb Associations, potential Webb Associations, or firms contemplating a collective export arrangement, to the following statement made by a former Assistant Attorney General in charge of the Antitrust Division:

> The existence of an antitrust exemption for export associations inevitably affects competition at home and thereby affects the American consumer. Every export arrangement that offsets the amount of a product sold abroad must inevitably affect the amount sold at home (emphasis added).[3]

Mr. Turner's remarks conspicuously fail to recognize that, in passing the Webb Act, Congress intended

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3. Testimony of Donald F. Turner, 1976, before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary.

to effectuate a policy in the national interest and stimulate exports even though there might exist some danger to domestic competition. Moreover, the Department's antitrust chief failed to acknowledge that if, in fact, abuses are found judicial remedies are available to deal with them.

2. Confusion in Defining Application of Antitrust Laws

As admitted by many antitrust lawyers both in and out of the government, and as indicated in the Justice Department's 1977 Antitrust Guide for International Operations, this country's antitrust laws -- particularly, as they apply to foreign commerce -- are *rarely* susceptable to clear and concise rules for determining what is permissible conduct.

For example, a former Antitrust Division Chief recognized that the standards for analyzing "collateral restraints" in joint ventures are "both too tough and too vague".[4] Moreover, he stated, this critical area of international trade activity is "quite rightly subject to confusion and critism and the (Antitrust) *Guide* did nothing to resolve the issue."

Similarly, the *Guide* itself notes that "the United States Antitrust statutes do not provide a

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4. Baker, Donald, "The Published Guide for International Operations Two Years Later" (1979) at 11-12.

checklist of specific, detailed statutory requirements, but instead set forth principles of almost constitutional breadth" (Guide at 21).

With regard to joint ventures for export, although certain very narrowly defined short-term joint ventures may be permitted by the Justice Department, there is no assurance that they may not be attacked through a potentially crippling private right of action.[5] The Justice Department, through its Guide, fails to recognize that many long-term joint ventures are necessary to reap the benefits of developing and retaining profitable foreign markets.

B. U.S. Competitive Disadvantages in Foreign Transactions

One of the primary reasons why U.S. firms need antitrust protection for export cooperation arrangements is to enable them to compete more effectively in world markets.

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5. The Antitrust Guide even conditions the creation of short term joint ventures, stating "Any joint venture among competitors involves some antitrust risk that the cooperation may spill over into other areas". (The Antitrust Guide at 20). It is important that procedures be created that would allow firms to alter their commercial practices -- without fear of antitrust prosecution -- where there are indications that domestic competition is being adversely impacted as a result of the export arrangement.

As stated so succiently by the American Bar Association as far back as 1954,

> ...the existence of State controlled buying agencies, State monopolies and other foreign industiral combinations make it desirable that American exporters be permitted to combine amongst themselves in export associations.[6]

In centrally planned economies, there is no necessary link between economic lists and prices. Indeed, like cartels, state-trading organizations are given a monopoly over the importing and exporting of such goods and may control the quantities and prices of such goods. The decisions of the state planners promote governmental objectives and bear no relation to competitive conditions. As a consequence, it is extremely difficult for the individual American exporter to face non-price competition in these countries' home markets and in third country markets.

Moreover, the Judiciary Committee should be mindful of the competition individual American exporters currently face in competing with the large integrated trading companies which have been established worldwide, particularly in Japan. These organizations began on the theory that a combination operates more efficiently than the independent constituent firms. The

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6. Report of the ABA Committee on Antitrust Problems in International Trade, 5 ABA Section of Antitrust Law 188 (1954).

enormous success of international trading companies is most pronounced in Japan and Korea, where their role in export expansion has greatly contributed to the growth in their economies.

Lastly, unlike other antitrust systems in the world, American law prohibits any cooperative arrangements by firms which restrain export trade, even if the restraint has no effect on domestic interstate trade. Most other industrialized strike a balance between antitrust enforcement and other national priorities, such as export promotion or increased employment. In stark constrast, in one landmark case, the U.S. court found that "the art has rapidly advanced, production has increased enormously, and prices have sharply declined..." Yet, because "the suppression of competition...is in and of itself a public injury.." a violation of our antitrust laws was found.[7]

C. Possible U.S. Multinational Alternatives

If Congress fails to provide an adequate exemption and system for permitting U.S. firms to cooperate for export purposes, there is a possibility that more and more U.S. multinationals will undertake cooperative arrangements from other trading countries' mar-

7. United States v. National Lead Co., 63F Supp.513 (D.C.N.Y.), aff'd., 332 US 319.

kets rather than our own.

Such "global sourcing" might be necessary to compete against the private, public, and quasi-public combinations that are operated for export in such countries as France, Germany and Japan.

If U.S. multinationals are forced to look abroad to export collectively from those countries, the result will mean (1) lost U.S. jobs, (2) lost U.S. revenues and (3) declines in the U.S. balance of trade and payments.

V. JUSTICE DEPARTMENT RECENT RECOMMENDATIONS ON FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

It was encouraging to learn that the Justice Department endorses the thrust of this statement; namely, in William Baxter's words, that the Title II Export Trading Company "procedure would provide a degree of antitrust certainty and assurance beyond that provided by legislation such as S. 795". (S.795 is the Senate companion to HR 2326.)

However, I would urge Congress to carefully assess the effects of introducing a 50 percent rule, as recommended by the Assistant Attorney General. This rule would prohibit, with only certain undefined exceptions, certification to associations whose members comprise 50 percent or more of the domestic market for a product or service that they are exporting.

The apparent rationale for this recommendation is based upon a concern that the activities of highly concentrated U.S. industries -- if permitted to be carried out collectively for export purposes -- are more likely to result in domestic spillover effects than if concentration did not exist. It is believed that a limitation placed upon the industries able to take advantage of an antitrust exemption is unnecessary since the FTC or Justice can always bring suit in Federal court when there is evidence of a restraint on domestic trade. It is simply bad policy to assume that the activities of every concentrated industry that cooperates in any way to increase exports will result in a restraint on interstate trade.

Additionally, the 50 percent rule could very easily exclude many of the small and medium sized firms that Congress would like to see enter the export market. It is well known that in antitrust or trade regulation analysis, product markets can be defined extremely narrowly. Invariably, there are fewer firms in any industry where the product market is defined narrowly. As a result, if the Justice Department's recommendation is accepted, many small and medium sized firms in both the manufacturing and service sector may be unintentionally excluded from taking advantage of the antitrust exemption for export trade.

VI. CONCLUSION

If enacted, HR 2326 would provide only a marginal benefit to U.S. firms seeking to enter into collective export arrangements without fear of antitrust retaliation.

In order to provide the assurance that is necessary to permit cooperative action and therefore to enable U.S. firms to better compete in world markets, Congress must place primary jurisdiction for administering any antitrust exemption in the Commerce Department where there is an increasingly committed determination to increase U.S. exports, which in turn will stimulate domestic production, increase U.S. employment and improve this country's international trade account.

In order to effectuate the desired policy, it is critical to establish a procedure (i.e. compliance procedure) which precisely conveys the message to exporters that they will not be antitrust liable for transactions which are carried out within the parameters of the certification.

In this regard, it is believed that the certification procedure as set forth in HR 1648, Title II is not difficult to understand or to follow and that -- on balance -- the complexity that may be seen by some observers is far preferable to an exemption that does not provide maximum antitrust certainty. If this certainty is not provided by Congress, there is a strong likelihood that a substantial number of companies will not take advantage of the exemption, as has been the case under the present Webb Act.

AMERICAN BAR ASSOCIATION

SECTION OF
ANTITRUST LAW
1981-1982

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WRITER'S DIRECT TELEPHONE NUMBER (312)

December 7, 1981

The Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

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Dear Mr. Chairman:

Your Committee has held hearings this year on several bills concerning the application of the anti-trust laws to export trading. These include your own bill, H.R. 2326, the "Foreign Trade Antitrust Improvements Act of 1981" (considered in connection with H.R. 1648, the "Export Trading Company Act of 1981"); and H.R. 2459, the "Commission on the International Application of the United States Antitrust Laws Act." As Chairman of the International Trade Committee of the American Bar Association's Section of Antitrust Law, I would like to bring to your attention the enclosed Report approved recently by the Antitrust Section discussing these differing bills, and request that the Report be made a part of the record of your Committee's deliberations on H.R. 2326.

The Report first analyzes the arguments pro and con, aired at Congressional hearings earlier this year, concerning whether the United States' export performance has been deficient in recent years and, if so, whether part of the reason may be some businesses' purported uncertainty as to the applicability of the antitrust laws to their exporting endeavors. The Report then reviews recent foreign commerce antitrust cases to see whether the apparent "uncertainty" is based on any real inconsistencies in the law. The Antitrust Section concludes that, although the jurisdictional "effects" tests applied by the courts and the Justice Department are similar to one another in substance, if not in exact wording, there may still exist a perception among American businessmen that the reach of the antitrust laws in the export field is uncertain. The Report notes the possibility that such a perception may inhibit some American export activity.

Therefore, in the Report and accompanying Resolutions, the Antitrust Section recommends that in view of the major lingering questions about the extent and causes of any deficiency in America's export performance, and the broader questions about how best to reconcile the antitrust laws with America's trade and foreign policy interests, Congress should expeditiously establish a blue-ribbon commission to study the international application of the United States antitrust laws -- such as S. 432 and H.R. 2459 would establish -- and defer action for now on proposals to amend the antitrust laws. (As you know, the ABA as a whole has adopted a resolution supporting passage of an international antitrust study commission bill.)

The Section cautions, however, that if Congress is inclined to take substantive action immediately, the Section favors adoption of the generic amendment to the Sherman Act proposal (H.R. 2326 and S. 795), with certain clarifying changes, over the more cumbersome regulatory certification procedure to be administered by the Commerce Department under S. 734 and H.R. 1648.

To supply you with a summary of the Antitrust Section Report, I am also enclosing a copy of my testimony on behalf of the Section of Antitrust Law this past Thursday on S. 432. Please let me know if there is any way the Antitrust Section can be of any further assistance to the Committee concerning these matters.

Respectfully,

A. Paul Victor
Chairman, International Trade Committee
Section of Antitrust Law
American Bar Association

:aba

AMERICAN BAR ASSOCIATION

1155 EAST 60TH ST., CHICAGO, ILLINOIS 60637 TELEPHONE (312) 947-4000

WRITER'S DIRECT TELEPHONE NUMBER (312)

October 26, 1981

AMERICAN BAR ASSOCIATION
<u>Section of Antitrust Law</u>

<u>RESOLUTIONS</u>

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

1. BE IT RESOLVED, that the Section of Antitrust Law of the American Bar Association recommends that pending enactment of legislation establishing a Commission on the International Application of the United States Antitrust Laws, as recommended by the American Bar Association at its Annual Meeting in August 1981 (such as S. 432 and the similar bill, H.R. 2459), and pending publication of the commission's report and recommendations, Congress should defer consideration of amendments to the antitrust laws limiting the application of those laws with respect to conduct involving foreign commerce (such as H.R. 2326 and its companion bill, S. 795) and legislation establishing an antitrust exemption and certification procedure for export trading companies and associations other

than the procedure already established in the Webb-Pomerene Act (15 U.S.C. §§ 61 *et seq.*) (such as the procedure provided for in Title II of S. 734 and the similar bill, H.R. 1648).

2. BE IT FURTHER RESOLVED, that if Congress nonetheless considers enacting any of the legislation described above before it creates the study commission described in Resolution 1, above, or before the commission publishes its report and recommendations, the Section of Antitrust Law of the American Bar Association recommends enactment of H.R. 2326 and its companion bill, S. 795, subject to certain amendments, and opposes enactment of those provisions of Title II of S. 734 and the similar bill, H.R. 1648, which would establish a new antitrust exemption and certification procedure for export trading companies and associations or any similar legislation.

3. BE IT FURTHER RESOLVED, that the Chairman of the Section or his designee is authorized to appear before the appropriate committees of Congress to present testimony in support of the above Resolutions and otherwise to communicate these Resolutions to such committees, their members, and others.

AMERICAN BAR ASSOCIATION

SECTION OF ANTITRUST LAW 1981-1982

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WRITER'S DIRECT TELEPHONE NUMBER (312)

October 26, 1981

AMERICAN BAR ASSOCIATION
Section of Antitrust Law

REPORT TO ACCOMPANY RESOLUTIONS CONCERNING LEGISLATIVE PROPOSALS TO PROMOTE EXPORT TRADING

I. Summary.

A number of trade experts have asserted that America's export performance has been deteriorating in recent years and have suggested that this country's antitrust laws are significantly to blame. More specifically, they have contended that American companies are uncertain about the application of the antitrust laws to export activities and that this uncertainty discourages the companies from entering and competing aggressively in export markets.

To help reduce such perceived uncertainty, two possible legislative remedies have been proposed. One, the "Export Trading Company Act of 1981" (S. 734 and H.R. 1648), would, in pertinent part, authorize the Secretary of Commerce to issue to qualified export trading companies and associations a certificate exempting them from antitrust liability for export activities specified in the certificate. The other major proposal, the "Foreign Trade Antitrust Improvements Act of 1981" (H.R. 2326 and

S. 795), would avoid a new regulatory certification procedure and amend the Sherman Act generically to confine its reach over foreign commerce to conduct having a "direct and substantial effect on trade and commerce within the United States."

Other trade specialists have questioned both whether United States exports are genuinely lagging and, if they are, whether amending the antitrust laws is really necessary to improve the situation. These observers have urged Congress to refrain from doing anything more at present than to establish a bipartisan commission to study the numerous questions relating to the application of the United States antitrust laws to international transactions. The ABA House of Delegates, at its annual meeting in New Orleans last August, adopted a resolution from the Section of International Law supported by the Section of Antitrust Law, supporting creation of such a study commission.

The Section of Antitrust Law believes that, in view of the major lingering questions about the extent and causes of any deficiency in America's export performance, and the broader questions about how best to reconcile the antitrust laws with America's trade and foreign policy interests, Congress should expeditiously establish a study commission and defer action for now on proposals to amend the antitrust laws. However, if Congress is inclined to take substantive action immediately, the Section favors adoption of the generic amendment to the Sherman Act proposal (H.R. 2326 and S. 795), with certain clarifying changes, over the more cumbersome regulatory certification procedure to be administered by the Commerce Department by S. 734 and H.R. 1648.

II. Asserted Need for Legislation.

A. America's Export Performance.

Numerous representatives of business and government testified at Congressional hearings earlier this year that America's export position is deteriorating and that new legislation is needed to shore it up.*/ In this connection, the Senate Banking Committee reported in March 1981 that:

> Although the ratio of exports to GNP rose from 4.2 percent in 1972 to 7.5 percent in 1979, U.S. imports, led by massive increases in the cost of oil, grew equally as fast, increasing in importance relative to GNP from 5.1 percent to 8.7 percent in the same years. Because imports have expanded since 1972 from a higher base than exports, the trade deficit has expanded sharply, with an aggregate deficit over the past five years exceeding $140 billion.**/

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*/ See Export Trading Company Act of 1981: Hearings on S. 144 Before the Subcomm. on Int'l Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs, 97th Cong., 1st Sess. (1981) (hereafter "Hearings on S. 144"); statements of Martin F. Connor, Esq., General Electric Co. (on behalf of the Business Roundtable), and others at hearings on H.R. 2326 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, Mar. 26 and Apr. 8, 1981 (hereafter "House Hearings on H.R. 2326"); statements of Howard W. Fogt, Jr., Esq. (on behalf of the Phosphate Rock Export Ass'n), and others at hearings on S. 795 before the Senate Comm. on the Judiciary, June 17, 1981 (hereafter "Senate Hearings on S. 795").

**/ Senate Comm. on Banking, Housing, and Urban Affairs, Export Trading Companies, Trade Associations, and Trade Services, S. Rep. No. 97-27, 97th Cong., 1st Sess. 4 (1981) (hereafter "Senate Report on S. 734").

Moreover, a study conducted by the National Association of Manufacturers in 1980 found that American imports of manufactured goods increased nearly four times as fast as exports since 1970. The study further found that the United States's share of world markets declined from 21.3 percent to 17.4 percent over the past 10 years, the largest relative decline among major industrial exporters. Finally, it observed that while America's manufactured goods trade has stayed in rough balance, Japan's and West Germany's reflected surpluses of $70 billion and $60 billion, respectively, in 1979.*/

Other statistics, however, paint a brighter picture on the United States exports side. Thus, the Department of Commerce has reported that total United States exports of goods and services increased approximately $54 billion from 1979 to 1980, helping to produce an overall $7 billion trade surplus.**/ Exports of services, in particular, remained strong, resulting in a surplus of over $34 billion in 1980.***/ In manufactured goods, the United States went from a $2.2 billion deficit in 1979 to a $12.5 billion surplus in 1980.****/ Finally,

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*/ Id.

**/ United States Dept. of Commerce, Bur. of Econ. Analysis, Survey of Current Business 50 (March 1981) (hereafter "1980 Survey").

***/ 1980 Survey, supra at 46.

****/ Remarks of the Hon. Peter W. Rodino, Jr., before the International Trade Seminar on "How to Export", sponsored by New Jersey Export Council, Ocean County College, and U.S. Department of Commerce, Toms River, N.J. (Oct. 2, 1981) at 1 (hereafter "Rodino Speech").

United States agricultural exports increased 18 percent, and nonagricultural merchandise exports rose 23 percent.*/ Figures such as these have led some participants in the current debate over export trade legislation to question claims that America's export performance is deteriorating.**/

B. Factors Inhibiting Improved Exports.

1. Major Export Disincentives.

Just as there is disagreement as to what marks the United States should be given for its export performance, there is also disagreement as to what factors may be inhibiting improvements in that performance. For example, the Department of Commerce reported last year, on the basis of a comprehensive survey of exporters, trade associations, and Foreign Service posts, that "the major disincentives" to increased American exporting "appear to be taxation of Americans employed abroad, uncertainties related to enforcement of the Foreign Corrupt

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*/ 1980 Survey, supra at 44. The country's deficit in overall merchandise trade dropped from $29.4 billion in 1979 to $27.4 billion in 1980. That this deficit nonetheless remains high may be attributable in substantial part to the fact that petroleum imports increased 32 percent to almost $79 billion, accounting for one half of the total increase in merchandise imports in 1980. Id. at 44-45. Representative Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, noted recently that in addition to the costly oil imports, America's balance of trade has been harmed by "the increasing value of the dollar relative to foreign currencies [which] has cut into exports and encouraged the import of many foreign made goods." Rodino Speech, supra at 1-2.

**/ Statement of John H. Shenefield, Esq., at 3, and statement of James A. Rahl, Esq., Professor of Law, Northwestern Univ., at 3-4, at House Hearings on H.R. 2326, supra; statement of A. Paul Victor, Esq., at 2-3, at Senate Hearings on S. 795, supra.

Practices Act (FCPA), and export control regulations."*/ Disincentives found to be of lesser concern to exporters were environmental and safety regulations, antiboycott regulations, and the antitrust laws. With respect to the latter item, the report stated:

> The extraterritorial reach of U.S. antitrust laws and their application to certain types of international transactions also concern exporters, but no specific instances were shown of these laws unduly restricting exports. Exporter uncertainties about the antitrust treatment of trading companies, however, could be a deterrent to the successful operation of such companies.**/

After holding hearings on ways to increase American exports, the Senate Banking Committee, in a report issued in March 1981, placed primary emphasis on spurring the development of export trading companies. The Committee concluded that such companies, "by diversifying trade risk and developing economies of scale in marketing, financing, and other export trade service, can do the exporting for large numbers of U.S. producers."***/ The Committee attributed the current paucity of export trading companies largely to the unavailability of sufficient incentives to banks to help finance export trading companies and to the

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*/ Report of the President on Export Promotion Functions and Potential Export Disincentives 1-7 (1980). Taxation of foreign earned income was found to be "the disincentive of overriding concern to the exporting community." Id. at 1-8.

**/ Id. at 1-9.

***/ Senate Report on S. 734, supra at 5.

lack of clear cut antitrust immunity for such companies' export activities.*/

2. Asserted Antitrust Uncertainty.

With respect to the antitrust aspects of this debate, a number of antitrust and international trade lawyers testified before Congressional committees earlier this year that uncertainty as to the applicability of the antitrust laws to conduct involving foreign commerce has inhibited United States producers from engaging in a wide range of joint export activities.**/ As noted by Howard W. Fogt, Jr., counsel to an export trade association, although the Justice Department's 1977 Antitrust Guide for International Operations and its 1980 Antitrust Guide Concerning Research Joint Ventures

> reflect a proper limitation on application of American antitrust laws to activities having a direct, foreseeable and substantial effect on U.S. domestic and import commerce . . . , the limited construction which the Justice Department has described has not always been

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*/ Id. at 5-7.

**/ E.g., statements of David N. Goldsweig, Esq., James R. Atwood, Esq., and Martin F. Connor, Esq., at House Hearings on H.R. 2326, supra; and statement of Howard W. Fogt, Jr., Esq., at Senate Hearings on S. 795, supra. Mr. Connor testified on behalf of the Business Roundtable that it is not difficult to pinpoint the general classes of business transactions "that are restricted by the threat of antitrust problems, from which that threat should be eliminated. These would include joint ventures or other arrangements among exporters that may involve the allocation of territorial responsibilities or the establishment of common prices or other terms of trade, technology licenses that restrict sales by the contracting parties to particular countries or regions, and offshore acquisitions that permit U.S. firms to enter foreign markets."

> followed by a number of lower courts in contexts where only minimal effects on U.S. interests are present.*/

In this connection, James R. Atwood observed that recent "expansive interpretations of the Sherman Act" by lower courts:

> leave American exporters in an unenviable position. They are worried that cooperative arrangements among themselves, intended to enhance the benefits from their export trade, might be subject to U.S. antitrust attack, not because of harmful effects in American markets or because of damage done to competing American exporters, but because of consequences felt in foreign markets by persons operating or buying abroad.
>
> . . . The vitality and profitability of U.S. export trade can easily suffer from the dampening effects of the uncertainty of current law. **/

By contrast, other antitrust and trade specialists at the same Congressional hearings questioned the asserted nexus between the country's export performance and apparent business uncertainty regarding the reach of the antitrust laws. Thus, William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, testified that:

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*/ Statement of Howard W. Fogt, Jr., Esq., at 17, at Senate Hearings on S. 795, *supra*. Mr. Fogt cited *Industria Siciliana Asfalti, Bitumi, S.p.A.* v. *Exxon Research and Engineering Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977), *Todhunter-Mitchell & Co.* v. *Anheuser-Busch, Inc.*, 383 F. Supp. 586, *modifying* 375 F. Supp. 610 (E.D. Pa. 1974), and *Waldbaum* v. *Worldvision Enterprises, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,378 (S.D.N.Y. 1978), together with a "but see" reference to *National Bank of Canada* v. *Interbank Card Ass'n*, 1980-81 Trade Cas. (CCH) ¶ 63,836 (2d Cir. 1981).

**/ Statement of James R. Atwood, Esq., at 4-6, at House Hearings on H.R. 2326, *supra*. Mr. Atwood cited the same cases as Mr. Fogt (*see* preceding footnote), as well as *Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978).

> Concern that joint export activities would violate the antitrust laws, or at least generate costly litigation, has been cited as a deterrent to such activities and as an inhibiting factor in export trade. . . . I would like to repeat again the firm view of the Department of Justice that these concerns are largely unfounded . . . . */

In addition, Professor Robert Pitofsky stated:

> I would also emphasize that while there has been some relative decline [in America's foreign trade position], it is highly unlikely that antitrust enforcement is a principal factor. Many other explanations have been offered: tax laws, the elimination of a fixed monetary rate of exchange, an out-of-date industrial plant in some industries, the tendency of industrial managers to emphasize short-term over long-term profits, and an alleged decline in American product quality. I'm not sure which if any of these factors really has played a major role; I do suggest that if one were making a list, antitrust enforcement would appear as a rather minor consideration. **/

And A. Paul Victor, Chairman of this Section's International Trade Committee, testifying in his personal capacity, stated that:

> It is often claimed, in support of exempting export activities from the antitrust laws, that America's export position is deteriorating and that the antitrust laws are to blame. Solid documentation or other proof, however, rarely accompanies such assertions.
>
> By contrast, when one looks at the statistics, it appears that American exports are doing quite well. . . .

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*/ Statement of William F. Baxter, Esq., Assistant Attorney General, Antitrust Division, at 1, at Senate Hearings on S. 795, supra.

**/ Statement of Robert Pitofsky, Esq., Professor of Law, Georgetown University, at 2-3, at Senate Hearings on S. 795, supra.

> Moreover, when one attempts to assess the role that the antitrust laws have played in deterring export activity, it does not appear to be significant.*/

3. Analysis of Foreign Commerce Cases.

Faced with those differing views, an analysis of antitrust foreign commerce cases would seem appropriate in order to determine whether the scope of antitrust's application to foreign commerce is, in fact, difficult to ascertain under the existing state of the law. An examination of such cases would seem to confirm that although, as a matter simply of wording, the "effects" tests they applied were not always identical to the one propounded by the Justice Department in its 1977 Guide, in substance the tests were, for the most part, applied quite similarly. Moreover, the jurisdictional results reached therein, even though on rare occasions somewhat expansive, can also, for the most part, be rationalized with the Justice Department's formulation of the "effects" test. Accordingly, any business uncertainty as to the applicability of the antitrust laws to foreign trade would seem to be an overreaction, for there is, with rare exception, no significant inconsistency between judicial precedents and the Justice Department's view of the "effects" test.

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*/ Statement of A. Paul Victor, Esq., at 2-3, at Senate Hearings on S. 795, supra. For other views, along similar lines, see statement of John H. Shenefield, Esq., at 3-4; statement of Eleanor Fox, Esq., Professor of Law, New York University, at 2; and statement of James A. Rahl, Esq., Professor of Law, Northwestern University, at 4-5, at House Hearings on H.R. 2326, supra.

In the 1945 Alcoa case, Judge Learned Hand concluded that the Sherman Act reached only those international transactions which both were intended to, and actually did, affect United States exports or imports.*/ Citing Alcoa and two subsequent Supreme Court decisions that cited that case,**/ the Justice Department's 1977 Antitrust Guide for International Operations stated the "effects" test as: "the U.S. antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce . . . ."***/

The courts in recent foreign commerce cases have diverged somewhat from the Justice Department's wording in their phrasing of the requisite "effects" test. For example, one federal appellate circuit, citing Alcoa, applied an "intended effects" standard,****/ while three other circuits required only that certain effects be shown to have occurred, regardless of whether they were intended or foreseeable.*****/

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*/ United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945).

**/ Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 704-05 (1962); Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

***/ United States Dep't of Justice, Antitrust Division, Antitrust Guide for International Operations 6 & n.13 (rev. ed. Mar. 1, 1977).

****/ In re Uranium Antitrust Litigation, 617 F.2d 1248, 1253-54 (7th Cir. 1980).

*****/ Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979); National Bank of Canada v. Interbank Card Ass'n, 1980-81 Trade Cas. (CCH) ¶ 63,836 at 78,471-72 (2d Cir. 1981).

In addition, while one court called for a showing of "a <u>substantial</u> effect on American foreign commerce,"*/ and another for a showing that the challenged conduct "<u>directly</u> affected the flow of commerce out of this country,"**/ other courts required showings that the conduct at issue had only "some effect on United States foreign commerce,"***/ "any appreciable anticompetitive effects on United States commerce,"****/ "anticompetitive effects in the United States,"*****/ or an "impact upon United States commerce."******/ And one lower court stated that "it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not <u>de minimus</u>."*******/

Perhaps more important than these variations in wording is the fact that the courts uniformly required that an

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*/ <u>Mannington Mills, Inc.</u> v. <u>Congoleum Corp.</u>, <u>supra</u> 595 F.2d at 1292 (emphasis added).

**/ <u>Todhunter-Mitchell & Co.</u> v. <u>Anheuser-Busch, Inc.</u>, 383 F. Supp. 586, 587, <u>modifying</u> 375 F. Supp. 610 (E.D. Pa. 1974) (emphasis added).

***/ <u>Timberlane Lumber Co.</u> v. <u>Bank of America</u>, <u>supra</u> 549 F.2d at 613, <u>clarified in Wells Fargo & Co.</u> v. <u>Wells Fargo Express Co.</u>, 556 F.2d 406, 428 (9th Cir. 1977).

****/ <u>National Bank of Canada</u> v. <u>Interbank Card Ass'n</u>, <u>supra</u> 1980-81 Trade Cas. (CCH) at 78,472.

*****/ <u>Waldbaum</u> v. <u>Worldvision Enterprises, Inc.</u>, 1978-2 Trade Cas. (CCH) ¶ 62,378 at 76,257 (S.D.N.Y. 1978).

******/ <u>Industria Siciliana Asfalti, Bitumi, S.p.A.</u> v. <u>Exxon Research and Engineering Co.</u>, 1977-1 Trade Cas. (CCH) ¶ 61,256 at 70,784 (S.D.N.Y. 1977).

*******/ <u>Dominicus Americana Bohio</u> v. <u>Gulf & Western Industries, Inc.</u>, 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

"effects" test of some sort be met. More specifically, it is clear in each of these cases -- either from the court's stated standard or from the result the court reached in the given circumstances*/ -- that a showing of something more than any effect on United States interstate, export, or import commerce would be required to establish subject matter jurisdiction. In this fundamental respect, the recent court decisions seem essentially consistent with the Justice Department's enforcement policy and with the state of the law generally, although courts and commentators may not always see eye to eye on what constitutes "substantiality" or "foreseeability."**/

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*/ In the recent Interbank Card case, for example, the Second Circuit's stated standard required only a showing of "any appreciable anticompetitive effects on United States commerce." That the appellate court was, if fact, applying a standard closer to the Justice Department's "substantial and foreseeable effects" test, however, is inferrable from its reversal of the district court for improperly basing its finding of subject matter jurisdiction on effects on American commerce that were too superficial. National Bank of Canada v. Interbank Card Ass'n, supra 1980-81 Trade Cas. (CCH) ¶ 63,836. See also Montreal Trading Ltd. v. Amax Inc., No. 79-1999, Antitrust & Trade Reg. Rep. (BNA) [Oct. 22, 1981] F-1 (10th Cir. Oct. 14, 1981).

**/ See e.g., American Bar Ass'n, Sec. of Antitrust Law, U.S. Antitrust Law in International Patent and Know-How Licensing 4-5 & nn. 16-18 (1981) ("The cases decided since Alcoa likewise recognize a need for limiting antitrust subject matter jurisdiction to something less than all conduct having any impact on American commerce. The approach generally taken . . . has been to make jurisdiction dependent upon whether the effect on U.S. commerce in each case is direct, substantial and reasonably foreseeable."); 1 P. Areeda & D. Turner, Antitrust Law 255 (1978) ("The central point, now well established, is that conduct, whether at home or abroad, can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States."); J. Atwood & K.

[footnote continued on next page]

When one goes beyond the simple recitation of the chosen "effects" test, one finds evidence of the similarity of approaches in many of the recent opinions. Thus, many of the courts expressly relied in whole or in part on Alcoa, even if they ended up phrasing their own "effects" tests a bit differently.*/ Also, where a court omitted from its own threshold test certain elements of the Justice Department's "effects" test, it sometimes took them into account later in its analysis. For example, while the court of appeals in Timberlane required a threshold showing only of "some" (but not necessarily a "substantial" or "foreseeable") effect on United

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[footnote continued from preceding page]

Brewster, Antitrust and American Business Abroad 163 (2d ed. 1981) ("Where the conduct falls within the substantive scope of the Sherman Act and has some effect on United States commerce, the possibility of antitrust jurisdiction remains alive."); Restatement (Second) of Foreign Relations Law of the United States § 18 (1965) (substantial, direct, and foreseeable effect).

*/ See Montreal Trading Ltd. v. Amax Inc., supra Antitrust & Trade Reg. Rep. (BNA) [Oct. 22, 1981] at F-3; National Bank of Canada v. Interbank Card Ass'n, supra 1980-81 Trade Cas. (CCH) at 78,471; In re Uranium Antitrust Litigation, supra 617 F.2d at 1253; Mannington Mills, Inc. v. Congoleum Corp., supra 595 F.2d at 1291-92; Timberlane Lumber Co. v. Bank of America, supra 549 F.2d at 609-10; Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., supra 494 F. Supp. at 1183-84, 1189; Dominicus Americana Bohio v. Gulf & Western Industries, Inc., supra 473 F. Supp. at 687; Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., supra 383 F. Supp. at 587. Although the courts in Industria Siciliana Asfalti and Waldbaum did not discuss Alcoa, both cited as authority the district's earlier Todhunter-Mitchell case, which had relied on Alcoa. See Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co., supra 1977-1 Trade Cas. (CCH) at 70,784; Waldbaum v. Worldvision Enterprises, Inc., supra 1978-2 Trade Cas. (CCH) at 76,257.

States commerce, it announced that, as part of its later multifaceted balancing of comity considerations, it would weigh:

> the relative significance of the effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.*/

Similarly, in Dominicus Americana,**/ a case criticized by some witnesses at the recent Congressional hearings, and Zenith,***/ the courts declined to rely simply on a threshold test but instead, citing Timberlane and Mannington Mills, called for comprehensive jurisdictional inquiries in the course of which the extent and locus of the challenged conduct's effects could be weighed against other comity factors. Again, in point of fact, this is essentially similar to the Justice

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*/ Timberlane Lumber Co. v. Bank of America, supra 549 F.2d at 614. As the Zenith court described the Ninth Circuit's approach, "the substantiality of the effect on United States commerce was subsumed into the comity analysis as a factor to be balanced, rather than being a formulaic requirement of uncertain degree." Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., supra 494 F. Supp. at 1188. Similarly, in Mannington Mills, although the Third Circuit called for a showing of "substantial" effect in its threshold jurisdictional determination, it deferred consideration of the foreseeability of the effect until its overall weighing of comity considerations. Mannington Mills, Inc. v. Congoleum Corp., supra 595 F.2d at 1291-92, 1297-98.

**/ Dominicus Americana Bohio v. Gulf & Western Industries, Inc., supra 473 F. Supp. at 687-88..

***/ Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., supra 494 F. Supp. at 1189.

Department's approach in determining jurisdiction in the international sphere.

In addition, if one looks at the particular circumstances in which differently worded "effects" tests were applied in the four lower court decisions that have drawn the most criticism and raise the most concern -- _Dominicus Americana_, _Todhunter-Mitchell_, _Industrial Siciliana Asfalti_, and _Waldbaum_ -- one could argue that the courts could have reached the same jurisdictional results had they been applying the standard adopted by the Justice Department in its 1977 _Guide_.

Thus, in all four cases, the courts focused on the challenged conduct's _foreclosure_ of other United States companies' export opportunities:

> -- In _Dominicus Americana_, the complaint alleged a number of anticompetitive unilateral and conspiratorial actions by which the defendant American proprietor of a tourist resort in the La Romana section of the Dominican Republic delayed and disrupted the construction, local servicing, and marketing activities of a competing tourist resort which plaintiff American corporations were seeking to develop in the same area. While suggesting (without deciding) that the requisite showing of effects on American commerce had been made, the court declined to make a determination of subject matter jurisdiction until the parties could conduct discovery sufficient to permit a multifactor jurisdictional analysis under _Mannington Mills_ and _Timberlane_.*/

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*/ _Dominicus Americana Bohio_ v. _Gulf & Western Industries, Inc._, _supra_ 473 F. Supp. at 684-86, 688.

-- In Todhunter-Mitchell, the court held not only that it had jurisdiction, but that defendant United States brewer had violated Section 1 of the Sherman Act when defendant sought to prevent plaintiff Bahamian beer distributor from competing with its exclusive distributor in the Bahamas by restraining two of defendant's independent United States wholesalers from reselling its beer to plaintiff.*/

-- In Industria Siciliana Asfalti, the court declined to grant defendant United States engineering firm's motion to dismiss for lack of subject matter jurisdiction where plaintiff Italian developer of an Italian oil refinery could establish that defendant had coerced it into agreeing to a reciprocal dealing arrangement. Under the arrangement, it was to purchase defendant's engineering services instead of the cheaper, "more advantageous" services of a competing United States engineering firm, and receive in return a favorable crude oil supply contract from defendant's sister corporation, Esso Italiana, a substantial supplier of crude oil for refining in the Italian market. The court stated that "the required impact upon United States commerce is supplied by the allegation that trade in the export of design and engineering services was restrained."**/

-- In Waldbaum, the court refused to grant defendant United States film licensor's motion for summary judgment on plaintiff South African private film library operator's claim that defendant's "block booking" tying arrangement in the rental of its films for showing in South Africa violated the Sherman Act. The court noted that it had been alleged that the tying

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*/ Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., supra 375 F. Supp. at 622-24, modified, 383 F. Supp. at 587-88.

**/ Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co., supra 1977-1 Trade Cas. (CCH) at 70,783.

> arrangement "has the effect of foreclosing other United States distributors from the market in South Africa which would be available if not for funds the plaintiff spent on the tied products."*/

Foreclosure of rival United States companies' export opportunities is just the type of effect on American commerce that the Justice Department's Guide would apparently find sufficient as a basis for jurisdiction.**/ Although we recognize that some might quarrel as to the "substantiality" of the foreclosure effects in the above decisions, they should at least not be characterized as *de minimis*. Moreover, one cannot help wonder whether the criticisms of at least *Todhunter-Mitchell*, *Industrial Siciliana Asfalti*, and *Waldbaum* would have been as severe if the plaintiffs had been either the Justice Department or the American company whose export opportunities were allegedly foreclosed rather than a *foreign* company whose business in a *foreign* market was allegedly injured.

We note that some witnesses at the recent Congressional hearings criticized these cases on the ground that they applied the United States antitrust laws to conduct whose

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*/ *Waldbaum v. Worldvision Enterprises, Inc.*, *supra* 1978-2 Trade Cas. (CCH) at 76,255, 76,257-58.

**/ The *Guide* stated that one of the government's "two major purposes with respect to international commerce" is "to protect American export and investment opportunities against privately imposed restrictions." United States Dep't of Justice, Antitrust Division, *Antitrust Guide for International Operations*, *supra* at 5.

"primary" impact was on a foreign market.*/ This situation does not necessarily distinguish the "effects" tests, as applied in these cases, from the "substantial and foreseeable" formulation of the test set forth by the Justice Department in its 1977 Guide. The latter test does not require a showing that the adverse effect on United States commerce is "primary," or that it somehow outweighs either the effect on the foreign market involved or the challenged practice's purportedly "procompetitive" effect in promoting this country's position in foreign trade. That is not to say, of course, that some such balancing of domestic and foreign effects should not (and has not) become a standard part of courts' broader, post-Timberlane, jurisdictional determinations.

In addition, criticism of the jurisdictional analyses in at least Todhunter-Mitchell and Waldbaum may to some extent be a reflection of the dissatisfaction with those courts' holdings on the merits.**/ In both cases, the courts declared the challenged conduct unlawful on the basis of per se rules. As a result, the courts had no occasion to inquire significantly into the extent of the challenged conduct's

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*/ E.g., statements of David N. Goldsweig, Esq., at 4, at House Hearings on H.R. 2326, supra. See also statement of Martin F. Connor, Esq., at 5, at House Hearings on H.R. 2326, supra ("we see no reason why our laws should reach out to regulate transactions whose primary effects occur outside of our territory").

**/ The courts did not reach the merits in the other two recent lower court cases, Dominicus Americana and Industria Siciliana Asfalti.

anticompetitive effects on United States commerce; under a per se analysis, such effects were presumed. Adding to the critics' concern may have been the fact that the particular per se rule applied in Todhunter-Mitchell -- the Schwinn rule governing certain non-price vertical restraints*/ has since been discarded by the Supreme Court. Today such a case would probably be adjudicated under GTE Sylvania's rule of reason, quite possibly with different results.**/ Moreover, although the per se rule applied in Waldbaum has not been discarded,***/ that case may involve just the sort of conduct -- namely, a "block booking" tying arrangement having little demonstrated exclusionary impact on rival United States exporters -- which, in the foreign trade context, might well more appropriately be analyzed under the more flexible rule of reason.****/

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*/ 375 F. Supp. at 622, 624, citing United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967).

**/ See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), overruling United States v. Arnold Schwinn & Co., supra.

***/ 1978-2 Trade Cas. (CCH) at 76,257, citing United States v. Loew's Inc., 371 U.S. 38 (1962) (per se rule against "block booking" tying arrangements).

****/ Commentators have suggested that per se rules traditionally applied to particular types of domestic conduct should not automatically be applied to similar conduct in an international trade setting. See, e.g., 1 P. Areeda & D. Turner, Antitrust Analysis 268-69 (1978).

In a case study presented in its Antitrust Guide for International Operations, supra at 38-39, the Justice Department suggested that it might well not seek to invoke United States antitrust jurisdiction over a package licensing arrangement of the sort challenged in Waldbaum.

Finally, regardless of the actions taken by the four lower courts involved in the above discussed cases, it is clear from two even more recent decisions by appellate courts, Interbank Card and Montreal Trading, that where a plaintiff cannot show "more than a speculative and insubstantial effect on United States commerce," the courts will not hesitate to dismiss the case.*/

4. Perceived, If Not Real, Antitrust Problem

To summarize the above analysis, an examination of the antitrust foreign commerce cases reveals that, first, while the "effects" tests applied by the courts have differed somewhat in wording from the test advocated by the Justice Department, they are still closely akin to one another in substance. Moreover, to the extent that the jurisdictional results reached in some of those cases are arguably somewhat inconsistent with current antitrust doctrine, this may be attributable in part to those courts' now less persuasive reliance on certain *per se* rules to decide both the merits and the jurisdictional issues, and their failure to undertake a comprehensive *Timberlane* sort of balancing of foreign and domestic effects -- and, more generally, a balancing of United States interests with those of the foreign nation or nations involved.

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*/ Montreal Trading Ltd. v. Amax Inc., *supra* Antitrust & Trade Reg. Rep. (BNA) [Oct. 22, 1981] at F-3 (10th Cir. Oct. 14, 1981); National Bank of Canada v. Interbank Card Ass'n, *supra* 1980-81 Trade Cas. (CCH) ¶ 63,836 (2d Cir. 1981).

Notwithstanding the potential for rationalizing the few arguably overexpansive decisions discussed above, their existence -- even in the absence of any real uncertainty as to the "effects" test part of determining jurisdiction -- makes understandable the perception of some American businessmen that the United States antitrust laws prohibit certain exporting activities when, in fact, they very well may not. This perception of uncertainty may be sufficiently ingrained that some form of legislative relief may be a felt necessity by Congress. We turn now to a discussion of pending legislative proposals to deal with this perception.

III. Legislative Proposals and Section of Antitrust Law's Recommendations.

As noted above, members of Congress have introduced bills reflecting two different remedial approaches. The first approach would amend the Webb-Pomerene Act*/ to authorize the Commerce Department to issue certificates to qualified exporters that would exempt them from antitrust liability for those exporting activities specified in the certificates. The other approach would amend the antitrust laws to clarify the wording of the "effects" test.

In addition, although not mutually exclusive of these two approaches, legislation has also been introduced to create a blue ribbon commission to study in depth all aspects of the

*/ 15 U.S.C. §§ 61 *et seq*.

antitrust laws' application to foreign trade and to report to the Congress whether any changes in the antitrust laws in fact seem warranted.

We set forth our views on these proposals in more detail below. In summary, however, the Section of Antitrust Law believes that a detailed expert study of the interplay of the United States antitrust laws with foreign trade would be highly beneficial, and it recommends quick passage of legislation, such as S. 432 and H.R. 2459, to establish such a study commission. If feasible, the Section also believes that it would be advisable for Congress to postpone consideration of H.R. 2326, S. 734, and similar antitrust legislation until after it receives the study commission's report and recommendations, since the case for immediate antitrust legislation to promote exports does not seem compelling.

If Congress is nonetheless determined to take some form of antitrust action now, the Section of Antitrust Law opposes enactment of S. 734's and H.R. 1648's certification procedure as a burdensome new form of government regulation that is unlikely to accomplish its goal of helping small American companies to enter the export business. Rather, the Section supports passage of H.R. 2326 and S. 795, with certain word changes, as a more acceptable approach to remedying any perception that the United States antitrust laws stand in the way of American businesses competing jointly or aggressively abroad.

A. Establishment of Certification Procedure

The "Export Trading Company Act of 1981," passed by the Senate this past April as S. 734, and introduced in the House as H.R. 1648, seeks to promote the establishment of export trading companies. Title I of S. 734 would make several changes in the banking laws to encourage more generous financing of export trading companies.*/ Virtually no opposition to Title I was voiced at the Congressional hearings earlier this year before the House and Senate Judiciary Committees. We take no position on whether the changes proposed are necessary or appropriate.

Title II, however, has been more controversial. It would, first of all, amend the Webb-Pomerene Act to extend from exportation of goods to exportation of services the limited antitrust exemption available to qualifying export trading companies and associations for certain joint exporting activities. In addition, to encourage the formation of export trade associations by providing them certain antitrust immunity, Title II would establish a new certification procedure to replace the

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*/ The Senate Banking Committee stated in its report that the bill would "afford financing incentives to encourage formation and growth of export trading companies, including existing export management companies; direct the Export-Import Bank to develop an improved guarantee program to support commercial loans to U.S. exporters; require the Secretary of Commerce to provide information to U.S. producers regarding export trading companies and other firms offering export trade services; and permit banks and banking institutions to make limited investment in export trading companies." Senate Report on S. 734, supra at 4.

existing one in the Webb-Pomerene Act. The bill would give the Secretary of Commerce the power to grant an exemption certificate to applicants meeting specified criteria. The certificate would list those activities for which the trade association or company would receive an exemption. A limited time would be given the Secretary to make his determination and in so doing he would be required to consult with the Justice Department and the Federal Trade Commission. If either objected, it could seek an injunction in a *de novo* court hearing to determine whether the qualifying criteria had been met.

During the time that a certificate would be in effect, the trade association or company would be exempt from antitrust liability for activities and methods specified in the certificate that were carried out in conformity with the terms and conditions prescribed by the Secretary. After a certificate were to take effect, either the Federal Trade Commission or the Justice Department would be authorized to bring a court action to revoke the certificate on the ground that the trade association's or company's activities had been outside the terms and conditions contained in the certificate. Private parties would not be authorized to bring such revocation actions.

At the recent Congressional hearings, although little criticism was aimed at S. 734's proposed extension of the Webb-Pomerene Act to exportation of services,*/ many antitrust

*/ This is a change which the National Commission for the Review of Antitrust Laws and Procedures recommended in its report to the President in January 1979. *See Senate Report on S. 734*, supra at 19.

lawyers and others criticized the certification procedure that Title II of S. 734 would establish.*/ We agree with that view and are opposed to enactment of Title II of S. 734.

We have serious doubts whether the remedy for antitrust constraints (real or perceived) on joint export activity is to establish a new regulatory system in a non-antitrust agency, the Commerce Department, and to employ a new bureaucracy to implement it. Invocation of the certification procedure would take at least 3 to 6 months -- a substantial period of uncertainty in itself, which might discourage some firms from taking advantage of those export opportunities that require prompt action. The process would require companies to disclose development plans and other competitively sensitive information to the government -- a further possible deterrent. The certification procedure could also prove complicated, expensive, and burdensome to exporting companies and, in view of the provisions for comment by the public and other government agencies, a drain on government antitrust enforcement and trade promotion resources. Moreover, since S. 734 would place certifying and guideline-writing authority in the Commerce Department but enforcement authority in the Justice Department and the Federal Trade Commission, the bill would invite interagency

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*/ *E.g.*, statement of A. Paul Victor, Esq., at 6-7, at Senate *Hearings* on S. 795, *supra*; statement of Ky P. Ewing, Jr., Esq., *Hearings on S. 144*, *supra* at 340-43; statements of John H. Shenefield, Esq., at 12-13, Eleanor M. Fox, Esq., at 4-5, James R. Atwood, Esq., at 12-13, and James A. Rahl, Esq., at 13-14, at House Hearings on H.R. 2326, *supra*. *See also* 127 Cong. Rec. H779 (daily ed. Mar. 4, 1981) (remarks of Reps. Rodino and McClory).

conflicts. The resulting delay and inconsistent government policy could only further inhibit aggressive export trading.

Even if an American company (or group of companies) chose to submit to the cumbersome process and obtained a certificate, it might find that the certificate could not supply it with the protection it needed in the complicated, fluid environment of the international marketplace. For example, the certificate would shield the exporter from antitrust liability only for those activities specified in it. Thus, if a change in export opportunities or market conditions necessitated a modification in the nature or scope of the certificate holder's joint export activities described in its certificate, it would face the Hobson's choice of either proceeding with the modification and thus risking antitrust challenge or submitting to a lengthy new certification procedure.

Finally, by putting in place a complex apparatus for granting antitrust immunity to joint export endeavors, Title II of S. 734 might lead the courts, or at least some businessmen, to assume that joint export activities undertaken without a certificate would be fully open to antitrust challenge.*/

In sum, Title II of S. 734 might ironically prove a deterrent to joint export activity by the small and medium-sized companies the legislation is designed to assist. As a form of economic regulation, it also appears to run counter to the

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*/ *See* statement of James R. Atwood, Esq., at 12, at House *Hearings* on H.R. 2326, *Supra*.

Administration's strong desire for deregulation. We urge, therefore, that the approach embodied in Title II be rejected.

B. Generic Clarification of "Effects" Test.

Contrasting with S. 734's cumbersome certification procedure is the generic approach taken by the "Foreign Trade Antitrust Improvements Act of 1981." This bill was introduced in the House by Judiciary Committee Chairman Peter Rodino and Ranking Minority Member Robert McClory as H.R. 2326, and in the Senate by Judiciary Committee Chairman Strom Thurmond and Senator Dennis DeConcini as S. 795 [hereinafter referred to as H.R. 2326], and provides:

> Sec. 2. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:
>
> > "Sec. 7. This Act shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the Unites States or has the effect of excluding a domestic person from trade or commerce with such foreign nation."
>
> Sec. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end thereof the following:
>
> > "This section shall not apply to joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation." */

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*/ H.R. 2326, 97th Cong., 1st Sess. (1981).

As Congressman McClory stated when he and Congressman Rodino introduced H.R. 2326:

> . . . This legislation will send to the export business community the clear signal that it appears to need in order for it to compete with greater confidence and freedom of action in the international marketplace, and it should also help to deter unjustified private and governmental actions against exporters. */

A number of the witnesses at the recent Congressional hearings supported H.R. 2326, especially in comparison to the "Export Trading Company Act of 1981," as a more effective way to clarify the law for American exporters.**/ We agree with this conclusion.

H.R. 2326 is intended, without changing the law substantively, to use the 1977 Justice Department Guide's wording to clarify the "effects" test to be applied in foreign commerce

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*/ 127 Cong. Rec. H779 (daily ed. Mar. 4, 1981) (remarks of Rep. McClory).

**/ E.g., statements of James R. Atwood, Esq., Eleanor M. Fox, Esq., and David N. Goldsweig, Esq. (Mr. Goldsweig discussing only H.R. 2326) at House Hearings on H.R. 2326, supra; statements of Robert Pitofsky, Esq., and A. Paul Victor, Esq., at Senate Hearings on S. 795, supra. See also statement of Ky P. Ewing, Jr., Esq., Hearings on S. 144, supra at 340-44. Other witnesses urged the conducting of an expert study of the international application of the antitrust laws before enactment of any substantive antitrust legislation, but nonetheless expressed a preference for the H.R. 2326 approach over the S. 734 approach. E.g., statement of John H. Shenefield, Esq., at House Hearings on H.R. 2326, supra; statement of Jay Angoff, Esq., at Senate Hearings on S. 795, supra.

cases.*/ It would thus afford American businesses -- especially the smaller firms -- increased assurance that their export activities, both joint and unilateral, would be protected from antitrust challenge as long as those activities affected foreign markets and not United States domestic or export commerce. Moreover, H.R. 2326 would accomplish this beneficial clarification of the law without creating -- as S. 734 would -- in a non-antitrust agency, a new economic regulatory program whose costly and time-consuming procedures, necessary information disclosures, and potential for interagency conflicts and court challenges might well deter individual businesses from seeking to benefit from it.

In addition to reducing American exporters' uncertainty by clarifying the "effects" test, H.R. 2326 would also help allay the increasing concern of foreign nations that America's antitrust laws infringe on those nations' sovereignty. By statutorily limiting the extraterritorial reach of those laws to conduct affecting either commerce "within the United

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*/ As Assistant Attorney General William Baxter testified concerning S. 795, H.R. 2326's companion bill:

> We understand that this bill is not intended to work any significant changes in the law, but rather to restate current enforcement policy and judicial interpretations governing the applicability of the antitrust laws to joint export activity. . . .

Statement of William F. Baxter, Esq., at 4, at Senate Hearings on S. 795, _supra_.

States" or the export opportunities of American companies, H.R. 2326 would signal clearly the limited objectives of the United States antitrust laws.

If Congress decides to enact H.R. 2326, the Section of Antitrust Law recommends the following wording changes, to improve the language and address legitimate concerns identified in comments made by various witnesses at the recent Congressional hearings.

With respect to the proposed amendment to the Sherman Act:*/

1. The phrase "direct and substantial effect" should be revised to add the concept of "foreseeability." This would bring H.R. 2326's effects test into line with the one stated in the Justice Department's 1977 *Antitrust Guide for International Operations*. The phrase should read: "direct, ~~and~~ substantial<u>, and foreseeable</u> effect."

2. The phrase "trade or commerce within the United States" should be revised to read: "trade or commerce within <u>(including imports of goods or services into)</u> the United States." The proposed parenthetical phrase would make clear that restraints on *imports* into the United States would remain subject to scrutiny under the United States antitrust laws (except to the extent that comity considerations might require otherwise).**/

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*/ In the following suggested wording changes, language to be deleted is hyphened out, while language to be added is underlined.

**/ *See, e.g.*, *Timberlane Lumber Co.* v. *Bank of America*, *supra* 549 F.2d 597; *United States* v. *Aluminum Co. of America*, *supra* 148 F.2d 416.

3. The concluding clause "or has the effect of excluding a domestic person from trade or commerce with such foreign nation" should be clarified in the legislative history to ensure that "domestic person" includes all business entities operating in the United States, whether or not owned or controlled by United States-based entities. In addition, to eliminate the absolute nature of the "excluding" criterion and to make this export-commerce clause consistent with the more general preceding clause, the former clause should be amended to read, "or ~~has the effect of excluding~~ on a domestic person's ~~from~~ trade or commerce with such foreign nations."

4. Finally, some thought should be given to ensuring that H.R. 2326 does not inadvertently encourage the formation of foreign cartels injurious to United States consumers and commerce. A statement could be included in the committee reports accompanying the bill that it should not be construed to exempt from antitrust scrutiny United States firms' (or foreign firms') participation in any market division agreement which, while ostensibly covering only foreign markets, in fact has a direct, substantial, and foreseeable effect on commerce within the United States or on export commerce from the United States.

With respect to H.R. 2326's amendment to Section 7 of the Clayton Act, we suggest the following:

1. The opening language, "This section shall not apply to joint ventures," should be revised to read "This section shall not apply to the formation of joint ventures." This change would preclude the unintended interpretation that Section 7 of the Clayton Act was no longer to apply to an acquisition or merger -- otherwise subject to its terms -- where one party to the transaction was a joint venture involved in export trading. The proposed revision would also make clear that the activities of export-trading joint ventures, as

opposed to the creation of such joint ventures, would be subject to antitrust scrutiny to the same extent as other business entities' activities (namely, the extent defined in the proposed Section 7 of the Sherman Act).

2. The phrase "limited solely to export trading" might imply that joint ventures which purchase supplies or services in the United States for use in their export business or engage in other domestic activity incidental to that business would fall outside the proposed exemption. To avoid any such unintended construction, an appropriate explanation should be included in the committee reports accompanying H.R. 2326.

In both parts of the bill, the word "foreign nation" should be changed to "foreign nations," to conform to the antitrust laws' usual terminology.

The provisions of H.R. 2326, revised in the ways we have proposed, would read:

> "Sec. 7. This Act shall not apply to conduct involving trade or commerce with ~~any~~ foreign nations unless such conduct has a direct, ~~and~~ substantial, and foreseeable effect on trade or commerce within (including imports of goods or services into) the United States or ~~has-the-effect-of-excluding~~ on a domestic person's ~~from~~ trade or commerce with ~~such~~ foreign nations."

> "Sec. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end ethereof the following: "This section shall not apply to the formation of joint ventures limited solely to export trading, in goods or services, from the United States to ~~a~~ foreign nations."

Aside from the above language changes, we recommend that both provisions of H.R. 2326 (with appropriate conforming language) be added to all of the antitrust laws and the Federal Trade Commission Act. This would achieve consistency in the enforcement decisions of the Justice Department, the Federal Trade Commission, and the courts and, in turn, increase business certainty regarding the impact of the antitrust laws on export activities.

Finally, if H.R. 2326 is enacted, we suggest that the Webb-Pomerene Act then be repealed as essentially unnecessary.

C. Creation of Study Commission.

As already noted, another legislative option under consideration is to create a bipartisan commission of legislators, executive branch officials, and private antitrust experts to undertake a comprehensive study of the many issues relating to the interplay of the antitrust laws and foreign trade. Bills to establish such a commission have been introduced in the Senate by Senator Charles Mathias (S. 432), and in the House by Congressman McClory (H.R. 2459). The ABA House of Delegates, at its annual meeting in New Orleans last August, adopted a resolution sponsored by the Section of International Law and supported by the Section of Antitrust Law that recommends to the President and Congress the establishment of just such a "Commission on the International Application of the United States Antitrust Laws." Since the various factors supporting establishment of such a study commission and an agenda of issues for such a commission to consider have already been discussed in the resolution and accompanying report -- as well as in a recent report of the ABA Antitrust Section International Trade Subcommittee Task Force*/ -- they will not be discussed again here.

At Congressional hearings earlier this year, several witnesses expressed the view that action on either H.R. 2326 or S. 734 (or both), should be deferred pending establishment of the study commission and completion of its work. As put by John H. Shenefield in his testimony:

> The logic of studying a situation before enacting legislation is difficult to withstand. There clearly is a perception that confusion in the area has impeded export activity. An authoritative and comprehensive examination by experts could do much to illuminate the area.**/

Professor James A. Rahl, Mark R. Joelson, and A. Paul Victor, in their testimony, made similar recommendations.***/ As we have already noted, if Congress can see its way to following

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*/ ABA Antitrust Section International Trade Subcommittee Task Force, "Report on Bills to Establish a Commission on the International Application of the U.S. Antitrust Laws." (Mar. 26, 1981) (copy attached).

**/ Statement of John H. Shenefield, Esq., at 7, at House Hearings on H.R. 2326, _supra_.

***/ Statement of James A. Rahl, Esq., at 14-15, at House Hearings on H.R. 2326, _supra_; statements of Mark R. Joelson, Esq., at 1-3, and A. Paul Victor, Esq., at 4-5, at Senate Hearings on S. 795, _supra_. _See also_ statement of Joel Davidow, Esq., at 8, at Senate Hearings on S. 795, _supra_.

such an approach, it would make eminently good sense.*/ If not, however, again, we support the "Foreign Trade Antitrust Improvements Act" (H.R. 2326) rather than the new certification procedure established by Title II of the proposed "Export Trading Company Act" (S. 734), and still urge creation of a study commission to examine the antitrust laws in effect at that time and how they relate to the international commerce of the United States.

A. Paul Victor
Chairman
International Trade Committee
Section of Antitrust Law

Daniel R. Barney
Member
Section of Antitrust Law

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*/ Antitrust courts dealing with foreign commerce cases have increasingly been wrestling with a significant array of difficult questions involving foreign policy issues, as well as economic and law enforcement considerations. See, e.g., Timberlane Lumber Co. v. Bank of America, supra 549 F.2d 597; J. Atwood & K. Brewster, Antitrust and American Business Abroad, supra at 159-81. While application of an "effects" test remains an important threshold element of the overall jurisdictional/comity determination, it is only one of a number of significant elements. Moreover, in many instances, the court's consideration of effects is necessarily interrelated with its consideration of the other jurisdictional elements. Different courts' somewhat varied handling of these complicated jurisdictional/comity determinations suggest that it is advisable to conduct an expert study of the full range of jurisdictional determinants, in hopes of arriving at a well-reasoned comprehensive remedy to American exporters' perceived uncertainty, before enacting specific amendments to the antitrust laws.

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Resolution of the
Section of International Law
Concerning H.R.5235

The following resolution was adopted by, and represents the views of, the Section of International Law and should not be construed as representing the views of the American Bar Association.

RESOLVED that the Section of International Law of the American Bar Association expresses its preference that legislation such as H.R.5235 be reviewed by a bipartisan Commission on the International Application of the United States Antitrust Laws, the establishment of which is encouraged, but that if Congress should consider H.R.5235, the Section of International Law proposes the attached technical corrections, and as amended, expresses its support of H.R.5235 (a "bill to amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to excluse from the application of such Acts certain conduct involving exports").

REPORT

PURPOSES AND PROVISIONS OF H.R. 5235

There are now pending before Congress several legislative proposals relating to the international application of the U.S. antitrust laws. The Section of International Law of the American Bar Association continues to believe that before such legislative proposals are enacted, a comprehensive study of the international application of the U.S. antitrust laws should be conducted by a bipartisan Commission. The Section reaffirms its support of the August 1981 Recommendation of the Association's House of Delegates supporting legislation establishing such a Commission. However, several Congressional committees have indicated a desire to proceed with specific legislation before the establishment of, and report by, such a Commission. Therefore, the Section has reviewd one of those proposals, H.R. 5235, a copy of which is attached to this Report.

H.R. 5235 represents an attempt to narrow the application of the antitrust laws in the context of export transactions. H.R. 5235, if encacted, would resolve some areas of confusion as to the subject matter jurisdictional scope of the antitrust laws. While the terms of the bill define the theorectical scope of application of the antitrust laws to export trade with precision, the practical application of the antitrust laws will still be subject to some ambiguity. Nevertheless, H.R. 5235 serves a useful function in providing clear conceptual landmarks against which to measure the application of the antitrust laws to American export trade and, therefore, in reducing the uncertainty over whether certain export trade conduct is covered by the antitrust laws.

H.R. 5235 amends the Sherman Act, the Clayton Act and the Federal Trade Commission Act to limit the subject matter jurisdictional scope of those laws. With respect to the Sherman Act and Section 5 of the Federal Trade Commission Act, the bill limits the application of those laws to conduct involving export trade or commerce with foreign nations. In order to trigger the substantive provisions of these antitrust laws, such conduct must have a "direct, substantial and reasonably foreseeable" effect on "trade or commerce which is not trade or commerce with foreign nations" or on a domestic person's export trade or commerce and then "only to the extent of that domestic person's injury. In addition, H.R. 5235 would amend section 7 of the Clayton Act to remove from its coverage joint ventures "limited to export commerce with foreign nations."

Policy Considerations

H.R. 5235 would resolve the fundamental theoretical dispute concerning the reach of the antitrust laws in the export trade context -- do the antitrust laws apply to restrictive conduct where the effect of such conduct falls entirely outside the United States? Case law has not pointed to any firm resolution of this central question. One line of cases holds that the competitive ethic must be preserved in export commerce to promote a free market allocation of resources and to prevent persons from entering into "anti-competitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home." Pfizer v. India, 434 U.S. 308, 315 (1978).1/ More recently, a line of cases has developed which holds that the antitrust laws do not extend to conduct with anticompetitive effects which fall entirely outside of the United States.2/

1/ See also, Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610, modified in part, 383 F. Supp. 586 (E.D. Pa. 1974); Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co., 1977-1 Trade Cas. ¶80,775 (S.D.N.Y. 1977); Dominicus Americana Bohio v. Gulf & Western Industries, 473 F. Supp. 680 (S.D.N.Y. 1979).

2/ E.g., National Bank of Canada v. Interbank Card Assn., 1980-81 Trade Cas. 63,836 (2d Cir. 1981); Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981); cert. denied, _____ U.S. ____ (1982); Conservation Counsel of Western Australia v. Aluminum Company of America, 518 F. Supp. 270 (W.D. Pa. 1981).

While H.R. 5235 embraces, in the main, this second line of cases, the principle concerns of the first line of cases are also accommodated by the bill. Nothing in the bill prohibits the application of the antitrust laws to conduct which has an appropriate effect on trade or commerce "which is not trade or commerce with foreign nations." If conduct with such a domestic spillover effect occurred, the antitrust laws would apply to such conduct with full force. Thus, the bill would not overrule cases such as United States v. Concentrated Phospate Export Association, 393 U.S. 199 (1968) where the U.S. elements of the conduct outweigh the foreign elements. Because the antitrust laws would be fully applicable to such conduct, a plaintiff would retain the right to recover all damages caused by the effects of the restrictive conduct; whether those effects fell within or without the United States. As a result, there would be no incentive for a firm to offset domestic liability for restraints impinging on domestic commerce by engaging in coordinated conduct abroad. Pfizer v. India, supra.

Moreover, the competitive regime is likely to prevail in American export trade under H.R. 5235. First, whenever there is a reasonably foreseeable possibility of a domestic spillover from export conduct, the involved parties would face the same antitrust substantive standards as they do today. Second, where conduct restrains the competitive opportunities of a domestic exporter, the involved parties would also face traditional antitrust substantive standards. Accordingly, in many situations, H.R. 5235 would not provide any incentive to do away with the competitive regime in American export commerce.[3/]

Thus, H.R. 5235 as a practical matter only withdraws from the scope of the antitrust laws conduct involving export trade that has no spillover effect on domestic commerce or on a domestic exporter, and does even that in a way which generally preserves the competitive regime in export trade.[4/] While it is unclear whether conduct in export trade generating an effect which falls wholly outside the United States is within the scope of the antitrust laws in their current form, there is value in resolving the question with clarity and finality.

3/ The two conceptual elements of the bill also interrelate to produce an additional incentive to continue the competitive regime in export trade. Horizontal restraints are generally effective in practice only when the commerce is in a fungible good or service. But in an industry providing fungible goods and services, the chance of domestic spillover effects are relatively high. By contrast, horizontal restraints involving differentiated goods or services pose relatively low risks of domestic spillover. However, horizontal conduct in the marketing of differentiated goods and services is often ineffectual. As a result, little export commerce would, in practice, be outside the subject matter jurisdictional scope of the antitrust laws.

4/ Much is often made of the symbolic and international political consequences of any action on the part of the United States to sanction export cartels. But as discussed above H.R. 5235, in connection with the realities of the international market place, will not, in general, create any incentives to the creation of export cartels. Restrictive conduct in export trade sanctioned by the bill and permitted by the marketplace should be prohibited, if at all, by the law of the foreign country feeling the effects of such conduct.

Section-By-Section Review

The text of H.R. 5235 raises some technical concerns which should be considered in further action on the bill. These concerns are detailed in order to prevent the creation of any unnecessary new ambiguities in the application of the antitrust laws to export trade.

Section 1 - Sherman Act Limitations

"Act [section] shall apply" - This language at page 2, lines 1, 14 and 20 of the bill makes it plain that H.R. 5235 limits the subject matter jurisdictional, and not the substantive, scope of the antitrust laws, a court which, in the absence of this provision, might apply the rule of reason rather than a *per se* standard to challenged conduct could view the limitation on subject matter jurisdiction as the exclusive area for accommodation of the special international characteristics associated with export trade. A rule of reason standard in export trade cases could provide a modicum of protection against antitrust suits because the plaintiff would have to overcome the defendant's explanation of its conduct; rather than simply satisfy a *per se* standard. The legislative history of the bill should make clear that the courts retain the freedom to examine any limitations on the substantive antitrust law standards to be applied in the export trade context.

"Conduct involving export trade or export commerce, with foreign nations" - Debate has occurred in the past over whether the location of the restraint has any bearing on whether the antitrust laws apply to the restraint. By ignoring where the conduct takes place and instead considering where the conduct's effect is felt, the bill corresponds to the traditional antitrust theory. Under the traditional view, a restraint in subject to the antitrust laws both where it is "in" and where it merely "affects" interstate or foreign commerce.

"Direct, substantial, and reasonably foreseeable" - These adjectives have been employed in antitrust parlance for a long period of time. Given the complex factual interplay of export conduct, the normative meanings of these terms, while conceptually helpful, will provide no practical standards.

"Effect" - As written, the bill places any effect on two classes of trade or commerce within the scope of the antitrust laws without regard to whether the effect in anticompetitive or not. Antitrust scholars have debated whether conduct which is subject to the antitrust laws is characterized only by the quantum of trade or commerce affected or by whether the quantum of competition in such trade or commerce is adversely affected. A related inquiry has focused on whether the antitrust laws protect consumers or protect competition.

As written, H.R. 5235 ignores whether conduct has an adverse effect on competition. This result not only departs from the weight of scholarly opinion but would produce perverse results. Under such an interpretation, conduct which has an anticompetitive effect which impinges only on defendants located in foreign nations and which also has a neutral or procompetitive domestic effects would be subject to the antitrust laws.[5/] In order to cure this potential difficulty it is suggested that the words "and such effect is the basis for the alleged injury under the antitrust laws" be added at the end of Sections 1 and 3 of the bill.

"Trade or commerce which is not trade or commerce with foreign nations" - The phrase includes both interstate and intrastate commerce. However, it is unclear whether conduct which involves both import and export commerce would be protected on the grounds that import commerce is "trade or commerce with foreign nations." It, therefore, may be prudent to define the trade or commerce to be protected positively as "interstate trade or commerce" rather than negatively as "not trade or commerce with foreign nations."

5/ *Cf*. *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert*. *denied*, 393 U.S. 1093 (1969).

"Export trade or export commerce, with foreign nations, of a domestic person" - Under Section 8 of the Sherman Act, "person" includes corporations and associations "existing under or authorized by the laws" of "any foreign country." 15 U.S.C. §7. A domestic "person" would thus seem to exclude a corporation incorporated in a foreign country which exports from the United States to foreign nations. Such an exclusion could raise constitutional and foreign policy questions. The committee report should make clear that such a corporation is a "domestic person" if it is engaged in exporting from the United States to foreign nations.

"Only to the extent of the injury to such domestic person" - It is possible to read this phrase as limiting the damages which may be recovered to a domestic person to actual rather than treble damages. While the concept of limiting damages to actual rather than treble damages in the export trade area has both merit and supporters, any such provision should be made as an amendment to Section 4 of the Clayton Act directly. 15 U.S.C. §15.

What is more likely is that this language is meant to go to the standing of a plaintiff. If the domestic person is not injured, the antitrust laws will not apply. In addition, only a domestic person that was injured could seek redress under the antitrust laws. The fact that one domestic person was injured would not allow another person to sue the entity whose conduct had injured the domestic person. Alternate language which might resolve these ambiguities would be "export trade or commerce, with foreign nations, of a domestic person in which case this Act shall apply only to the injury to such domestic person."

Section 2 - Clayton Act Limitation

"Shall not apply to any joint venture" - This phrase does not make clear that the parents which form such a joint venture, as well as the joint venture, are not subject to Section 7 of the Clayton Act. Alternative suggested language would be "shall not apply to the formation or operation of any joint venture."

"Limited to export commerce with foreign nations" - This language needs to be clarified in the committee reports so that incidental transactions where the joint venture purchases goods or services used in the course of export trade or commerce do not disable the joint venture from acquiring protected status.

Section 3 - Federal Trade Commission Act Limitations

The language of Section 3 tracks the language of Section 1 of the bill. Section 3 thus raises the same problems in those identified in the comments to Section 1.

CONCLUSION

For the foregoing reasons, the Section of International Law supports enactment of H.R. 5235 subject to adoption of the amendments suggested in this Report.

Respectfully submitted,

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Section of International Law